Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

M.A. EVERETT, *et al.*,

Petitioners,

v.

USAIR GROUP, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision denying jurisdiction is contrary to *Pennsylvania R.R. v. Day*.

Whether petitioners were required to formally join the union for a violation of its duty of fair representation for the district court to have jurisdiction.

Whether petitioners were denied their due process rights to have their dispute decided by an impartial tribunal by imposing the requirement under the Railway Labor Act that their retirement benefits be determined by an arbitration panel selected by the company and the union that no longer represents most of the individual petitioners.

Whether a retired pilot, no longer represented by the pilots' union, is an "employee" under the RLA.

LISTING OF PARTIES AS TO PROCEEDING

Plaintiffs/Petitioners:

M. A. Everett, *et al.* (*See* Appendix D, 26a).

Defendants/Respondents:

USAirways, Inc.

USAirways Group Inc.

Retirement Income Plan for Pilots of USAir.

There were no other interested parties in the district court below, and petitioners are aware of no intervenors or amicus curiae before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Four hundred-fifty retired pilots and fifty currently employed pilots for USAirways Corporation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The written opinion of the United States District Court for the District of Columbia, issued on May 31, 1996, determined that arbitration was mandatory under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "RLA"), and dismissed Counts I and III for lack of subject matter jurisdiction. The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court decision was filed on February 19, 1999.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

45 U.S.C. § 151. **Definitions; short title**

. . .

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an

employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

45 U.S.C. § 351. **Definitions**

For the purposes of this chapter, except when used in amending the provisions of other Acts —

(d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. . . .

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. The Decision On Dismissal

The District Court's jurisdiction was based on 28 U.S.C. § 1331 and 29 U.S.C. § 1001. The court found it had jurisdiction over Count II, which alleged a violation of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1022, *et seq.*, but stayed proceedings on that count until the end of the arbitration process to which petitioners were relegated by the court's dismissal of Counts I and III. The opinion is published at 927 F. Supp. 478, 482 (D.D.C.).

B. The Appellate Decision

The United States Court of Appeals for the District of Columbia decided that because the union was not made a party to the case, that jurisdiction was not appropriate and that there was no jurisdiction based on the district court's opinion. That decision was not published but is found at App. A, *infra.*

C. The Underlying Facts

This case involves the meaning of a short, but significant phrase — "unadjusted for dividends" — and which tribunal can decide whether nearly 450 retired and active airline pilots receive over $80,000,000 in retirement benefits. A constant theme of USAir is that the terms "unadjusted for dividends" has been uniformly intended to mean, from 1972 to the present, that "unadjusted for dividends" excludes dividends from the S & P 500 index upon which the Prior Plan minimum benefits calculations is based. Actually, USAir, solely to advance its economic purposes, changed the concept of the performance of the S&P 500 Stock Index with reinvested dividends to the performance exclusive of dividends. An examination of the facts in the record demonstrate that this proposition is wrong and was recently fabricated.

The parties to the 1972 Collective Bargaining Agreement knew that dividends and interest had been accumulated through reinvestment in an actual stock pool. They were told by USAir that their retirement benefits would be no less than that provided for in the earlier plan and, therefore, they understood that the S&P 500 Index (with dividends reinvested) would have to apply if the new benefit were to be no less than the old.

The 1973 Plan Amendment provided that a participant's retirement income under the new Plan:

> [s]hall not be less than that to which a[participant] would have been entitled at his Retirement . . . assuming . . . that had the Variable Retirement Income Plan remained in

> effect, the investment performance there under would be equal to the investment performance of the Standard & Poor's 500 Stock Index **(unadjusted for dividends)** . . .

That this Amendment required that dividends be included is confirmed by CIGNA's 1973 letter to Allegheny, which documented the fact that the Prior Plan minimum benefits were to be calculated the same as the minimum benefits under the Delta Plan.

In 1977, USAir used the S&P 500 index *with dividends included* in evaluating the effect of the new plan. Mr. Dyer, by then Treasurer of USAir and formerly of Connecticut General wrote a memo in which he discussed the performance of the phantom plan and the S&P 500 stock index. He stated that the performance of the fund management by USAir (under the new plan) was down about 20%, but that the S&P 500 was up 37.2%, which is the gain in the S&P 500 *with dividends included*. As Mr. Dyer said, the company promised the pilots "the Index result," that is, 37.2%, which was to replace the investment pool in the previous retirement plan. In fact, reinvestment of dividends had been the cornerstone of the minimum benefits formula from the inception of the 1972 Prior Plan.

On October 28, 1980, Mr. Malloy wrote a letter to Mr. Dyer in which he analyzed whether minimum benefit provisions would be triggered for a list of pilots provided by USAir. In performing this calculation, Mr. Malloy used the S&P 500 *with dividends reinvested*, and determined that the minimum benefit provisions would not be triggered.

In the 1990 period, when USAir tried to co-opt the Airline Pilots Association ("ALPA") into accepting its position on the inclusion of dividends, ALPA represented approximately five thousand pilots of USAir, only eight hundred or so of whom were eligible for coverage under the Prior Plan minimum benefit. Although USAir now claims that ALPA took the position that dividends should not be included, it is not so. At the December 13, 1989 meeting between ALPA representatives and USAir referred to earlier, ALPA took the position that dividends *should* be included. Mr. V.A. Bems, actuary for ALPA noted:

> The issues up for grabs are as follows:
>
> > The growth of the variable plan assets will be based on ". . . investment performance equal to the performance of the Standard and Poor's 500 Index." Some documents add in parentheses "unadjusted for dividends." It is Robert Haver's [of TPF&C] position that the S&P 500 Index (unadjusted for dividends) means that dividends are excluded from the calculation of the index. I feel that since all documents contain the words "investment performance equal to the performance of the Standard and Poor's 500 Index", (i) performance means dividends are part of the index, and (ii) "(unadjusted for dividends)" means that dividends will not be subtracted from performance of the Index. The impact of the choice is considerable.

If ALPA considered the matter at all, it did not request information from those who had been directly involved in the negotiations. By 1993 and 1994, the union had shifted

over to USAir's position on the inclusion of dividends in the calculation.

On October 9, 1993, Captain Donald Reubert, a member of the original negotiating team, notified ALPA that:

> The only way we differed between [the Delta Plan and USAir Plan] was that Delta had 120% and used 100% of the Standard and Poor's 500 investment performance. The wording of our contract made certain that *the benefit of the new plan would not be less than a pilot would receive under the old A and B plans,* with the variable part calculated according to the investment performance of the S&P 500 Index. The language did not mention dividends one way or another because it was not necessary, since the intent (as well as the wording) provided no lesser benefit than the Prior Plan which, in fact, reinvested dividends.

Despite this clear explanation, on February 2, 1994, the union informed the pilots that it would not pursue the matter and they would have to go to court themselves. Thus, it was made clear to the Prior Plan participants that the union opposed their efforts to obtain the bargained for retirement.

By April 1990, USAir had realized that the minimum benefit provisions would affect USAir's profits, in an amount then estimated at between 18 and 20 million dollars, even if dividends were excluded. If dividends were to be included, then the amount was estimated by TPF&C at between 122 million and 272 million dollars. To fend off the need to pay the retirement benefits negotiated in the

Prior Plan agreement, USAir began to build a "history" of the Prior Plan.

The company never presented ALPA with the figures, which had apparently been calculated, showing the shortfall if dividends were included. In the course of its review of the matter, Towers Perrin also considered the application of a number of different "conversion factors" to the calculation of the minimum benefit. In a letter to USAir, TPF&C noted that ALPA could insist on the use of a more current conversion rate of 9%, which would have added tens of millions of dollars to the minimum benefit. USAir did not disclose these conclusions to ALPA or the plan participants and beneficiaries, but instead included a proposed Letter Agreement with ALPA a provision which would have provided for the 3% rate, which was much more favorable to USAir and which would have deprived the participants of a benefit to which they were entitled. As outlined above, by 1994, the pilots' union had seen the threat to its current members if the Prior Plan was pegged to the investment performance of the S & P 500 Stock Index and saw the benefit to its current members in opposing the few Prior Plan union members and joining with USAir to defeat the benefits.

Thus, it is apparent that in both USAir and the union have an overarching interest in stacking any arbitration panel with arbitrators who will vote against the interests of petitioners.

REASONS FOR GRANTING THE WRIT

The significance of the award of retirement benefits is increasing for the individual as the impact of its system-

wide allocation becomes of great importance in the financial decisions of major corporations. In the instant case, petitioners are retired pilots or, in a handful of instances, pilots with over twenty-seven years experience with USAirways Inc. In 1972, all petitioners relinquished their interests in an actual stock pool and entered into a retirement agreement with then-tiny Allegheny Airlines, which provided for a floor for retirement benefits pegged to the investment performance of the Standard and Poor 500 Stock Index. This provision — referred to as "the Prior Plan" — has been preserved contractually to the present for the Prior Plan participants and is financed by respondent USAir.

As the years have passed, Allegheny Airlines grew through acquisitions and corporate expansion into the huge USAir conglomerate, which employs nearly ten times the number of pilots entering into the Prior Plan in 1972, whose active number of union member pilots has dwindled to about fifty. On the other hand, with expansion the fifty active Prior Plan participants now constitute about 1% of the USAir union members.

The central issue in the present controversy is which adjudicatory body shall determine whether the investment performance of the Standard and Poor 500 Stock Index means that dividends should be included or excluded when calculating the benefits multiplier. The relevant contractual language initially negotiated is "unadjusted for dividends." The evidence presented in the District Court by petitioners demonstrates that dividends were to be included in the agreement as negotiated by the Prior Plan pilots. As is clear, the USAir retirement plan was modeled on the Delta plan, which uses the dividends-included S & P 500 Investment Stock Index.

The economic effect on respondent USAir of the application of the dividends-included multiplier of the Prior Plan as originally negotiated ranges from $80 million to $200 million. This sum must come from the USAir contribution and will diminish the funds available to provide dividends to the USAir stockholders and to fund pay and retirement plans for the nearly five thousand union members who are not Prior Plan participants.

It has been held that this determination of the meaning in the Prior Plan of "unadjusted for dividends" — so important to the retired and older pilots — which will deprive USAir and the pilots' union of $80 million to $300 million and award that amount to petitioners, must be made by an arbitration panel selected by USAir and the pilots' union and that that procedure will not amount to a deprivation of due process.

Ruling on defendant USAir's Motion for Summary Judgment or to Dismiss, the District concluded based on Day, that it had no jurisdiction and, therefore dismissed Counts I and III, retaining jurisdiction over the ERISA count. That court applied *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959) contrary to its specific holding that it applied to an RLA process commenced while the plaintiff was still employed and that referred solely to work conditions. Here the retired pilot, who are unrepresented by the union and cannot bring a duty of fair representation suit against the union, are solely seeking retirement benefits. Moreover, if required to arbitrate under the RLA, they will have their issues decided by a four person panel selected by USAir and the union, both of which will suffer severe economic consequences if the panel finds favorably to petitioners in the central issue — whether dividends should be included in the investment performance of the Standard

and Poor 500 Stock Index. Thus, there will be inflicted on the 450 pilots participating in this claim a significant due process violation if the decision of the United States Court of Appeals for the District of Columbia is permitted to stand.

In addition, the appellate court refused to apply the rule in *Kaschak v. Consolidated Rail Corporation*, 707 F.2d 902 (6th Cir. 1983), which permits resort to the judicial system in the first instance — consistently with DFR cases — where there is an apparent violation of the union's duty of fair representation although a count formally charging the union is not included in the complaint.

Accordingly, certiorari should be granted because of the conflict of this decision with the Supreme Court in Day and the split in the circuits between this instant decision and *Kaschak* with respect to the necessity of joining the union in the complaint.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S DECISION IN *PENNSYLVANIA R.R. v. DAY.*

In its opinion, the District Court ruled, "Since plaintiffs' claims including those of the retired pilots, all arise out of their employment relationship with USAir, the RLA governs and the court lacks jurisdiction." This is erroneous.

The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, ("RLA") provides for the submission by employees of certain disputes to the employer up to and including the carrier's chief operating officer. 45 U.S.C. §§ 181-188. The word "employees" in the RLA is defined in § 153 of the

statute as "every person *in the service of a carrier*" [emphasis added), and therefore applies to those actually employed by the carrier.[1] The RLA further defines "employee" as requiring that the person be "subject to its [the employer's] continuing authority to supervise and direct the manner of rendition of his service." There can be no doubt that retired people, who are not covered by these definitions of employees, nor are they under USAir's supervision and direction are not included in the plain language of the statute. *Cf. Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984) (applicants for employment, since not employed, are not precluded from bringing suit). When interpreting the statute, courts need only look at the plain language; it is dispositive. It is well-recognized by ALPA and USAir that retired pilots are neither in the service of a carrier nor subject to its supervision and control. As such, they are outside the scope of the RLA. Congress well knew how to draft statutory language that included retirees: 45 U.S.C. § 351 uses the phrase "is or has been . . . in the service . . ."

Moreover, the purpose of the RLA's mandatory arbitration is to prevent employees in the transportation industries from striking, which could cripple the nation's economy. In the case of the retired pilots, a "strike" by them would not cripple the economy — indeed, nobody would notice it at all, since they are, by the RLA'a own terms, neither employees nor working. Nor could the few

1. The pertinent parts of § 184 are identical to § 153. Section 184 goes on to state, "Such boards of adjustment may be established by agreement between employees and carriers . . ." This section excludes retirees from the right to participate in the board selection process. Neither USAir nor ALPA has suggested that the retired pilots may participate in the board selection process.

remaining active pilots in the Prior Plan cause a strike by ALPA.

The case primarily relied on the District Court's opinion, *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), requires that retired pilots, unrepresented by their union, be treated identically to current employees on matters not related to the workplace or conditions of employment. Day filed his grievance while he was employed and following the procedure set forth in the RLA. His dispute had to do with pay and working conditions, which might affect the employer's workplace relations with active workers and the issues concerned matters which were peculiarly within the expertise of the board. The *Day* Court specifically limited its holding to case where "the employee has retired and seeks compensation for work performed while he remained on active service," and did not encompass issues solely related to retirement agreements and retired employees.

Not only are the retired pilots not within the definition of employees covered by the plain terms of the RLA, type of claims brought by appellants here is within the District Court's jurisdiction, and not the RLA's. That the District Court has subject matter jurisdiction over there claims is plainly set forth in the RLA itself:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of **an interpretation of agreements concerning rates of pay, rules, or working conditions** . . .

45 U.S.C.A. § 153(1)(i) (emphasis added).

The plain language of the statute states that the only disputes cognizable[2] by the RLA are those arising out of an interpretation of a bargaining agreement "concerning rates of pay, rules or working conditions." Here the dispute arises out of USAir's bad faith refusal[3] to use the proper index to calculate the variable benefit for the Prior Plan participants. There is no component of this calculation that constitutes a "rate of pay" for appellants or any other pilots at USAir nor does the calculation constitute a "rule" or a "condition of work".[4]

Rather, these are claims under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA") that certain benefits in the USAir Retirement Plan are due to the retired pilots. Thus, the calculation of the index by which the Plan Administrator determines retirement benefits for a small percentage of USAir pilots is not within the subject matter jurisdiction of the RLA for either retired pilots or the few Prior Plan participants still working.

That the selection of the proper stock index for the Prior Plan retirement benefit calculation is not the type of

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2. Grievances also may be subject to the RLA, but the retired pilots are not eligible to file grievances.

3. A reading of USAir's confidential memoranda makes it abundantly clear that USAir's and ALPA's bad faith is beyond cavil.

4. A whole section of the RLA, § 156, is devoted to the procedure in changing rates of pay, rules, and working conditions. From a perusal of § 156, two points stand out: retirees are not included in its consideration and there is no right or even a hint of a right that would include retirees in that procedure, either directly or through a representative.

determination committed to the exclusive jurisdiction of the RLA is seen in the Supreme Court's reasoning in *Pennsylvania R.R. v. Day,* 360 U.S. 548 (1959):

> We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Since nothing is a greater spur to the conflicts, and eventually to conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.

Id. at 553.

Unlike the determination of rate of pay and work conditions required in *Pennsylvania R.R. v. Day*, an adjudication by the District Court of USAir's bad faith refusal to calculate retirement benefits with the correct index would have no effect on uniform interpretation of the collective bargaining agreement — this being a unique situation — and it would not provide for "different pay for the same work or unfair differentials." The determination of whether Day was entitled to extra pay when he left his switching area involved working conditions and pay, which were peculiarly within the specialized technical knowledge and expertise of the System Board. The Supreme Court concluded:

> All of the considerations which led Congress to entrust an expert administrative board with the

> interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating *a claim for compensation for work performed while on active duty.* The nature of the problem and the need for experience and expert knowledge remain the same. [The considerations] are the same when the employee has retired and *seeks compensation for work performed while he remained on active service.*

(Emphasis added.) *Id.* at 552.

Since the retirement benefits language does not have anything to do the with "specialized technical knowledge" of pilots such as conditions of work, compensation for work or reinstatement, but applies solely to a determination more appropriately evaluated by an National Association of Securities Dealers arbitration panel, there is no sound reason to submit this matter to people skilled in flying airplanes.[5] Since the claims do not constitute pay for current pilots, rules relating to work, or working conditions under the express language of the RLA, its legislative history, or applicable case law, the claims are not subjects of the mandatory arbitration provisions of the RLA.

The care with which the Supreme Court set forth the limited circumstances in which a retiree could be required to arbitrate — when the retiree seeks compensation for work

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5. This was the import of Justice Douglas's dissent in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). Even under the majority opinion in *Andrews*, this district court would not lack jurisdiction, because Andrews deliberately retired to deprive the RLA of jurisdiction. This should not be used to create jurisdiction in the court.

performed while on active status — reinforces the thrust of the RLA's plain language that demonstrates that the RLA does not apply to appellants here. Accordingly, the District Court's reliance on *Pennsylvania R.R. v. Day* is misplaced.

None of the cases, which rely on *Pennsylvania Railroad v. Day*, 360 U.S. 548 (1959) opine that the word "employee," as used in the RLA, includes retired employees. None of those cases[6] discuss the plain language of the RLA, nor do they consider *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), which is on point with this case regarding retired employees.

Accordingly, to apply the RLA to a person seeking solely retirement calculations who was retired at the time the action was instituted would be contrary to the actual holding in *Pennsylvania R.R. v. Day* and the plain language of the RLA. Therefore, petitioners submit that the opinion of the Court of Appeals is contrary to this Court's opinion in *Day* and certiorari should be granted to review this.

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6. For example, *Alaska Air Line Pilots Association v. Alaska Airlines Inc.*, 735 F.2d 328 (9th Cir. 1984) and *Beard v. Carrolton Railroad*, 893 F.2d 117 (6th Cir. 1989). The District Court in this case alludes to *Allied*, but dismisses it without discussion by contending that *Pennsylvania R.R. v. Day* squarely held that the RLA's mandatory arbitration provisions apply to retired workers, without reservation.

II. THERE IS A SPLIT IN THE CIRCUITS OVER WHETHER UNION MEMBERS OR EX-UNION MEMBERS MUST FORMALLY JOIN THEIR UNION AS A DEFENDANT, WHERE THE POSITION OF THE UNION IS MANIFESTLY ADVERSE TO THE PETITIONERS AND THE UNION REPRESENTS VERY FEW OF THE PETITIONERS.

There are three situations where exhaustion under the RLA is not required before proceeding in court. Petitioners may proceed with their claims in court if any one of these exceptions are satisfied: (1) when the employer repudiates the private grievance machinery; (2) if the union breaches its duty of fair representation; or (3) where the administrative remedy would be wholly futile. *Glover v. St. Louis-S.F. R. Co.*, 393 U.S. 324, 328 (1969); *see also Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (1974) (citing *Glover*); *Griffen v. International U., United Automobile, A. & A. I. W.*, 469 F.2d 181, 183 (4th Cir. 1972); *Nemitz v. Norfolk & Western Railway Co.*, 436 F.2d 841, 849-850 (6th Cir. 1971). Petitioners have established that they meet all three exceptions.

Courts have found jurisdiction when employees bring a suit against their union alleging that their union has failed in its duty of fair representation (hereinafter "DFR"). Where a DFR count is joined, the District Court recognizes that the Board lacks jurisdiction and exhaustion is not required. *See Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) ("It is beyond cavil that a suit against the union for the breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts").

Although there is little question that ALPA's actions would support a DFR claim, if the retired pilots were union members, the District Court, believing that joining a DFR count is the only way for petitioners to overcome the RLA "exclusive" jurisdiction hurdle to judicial jurisdiction over the carrier, determined that the petitioners' failure to join the union gave jurisdiction to the Board. The District Court ruled that petitioners "cannot invoke the jurisdiction of this Court based on a hypothetical unpursued claim where the limits on federal court jurisdiction under the RLA are so clear."

An examination of USAir's, and, more importantly, ALPA's adverse relationship with petitioners demonstrates that petitioners — at least the retired pilots — are not covered by the perceived bar in *Pennsylvania R.R. v. Day*. Since they are not, the District Court's conclusion that *Pennsylvania R.R. v. Day* prohibits a finding that retired pilots can be a structural minority, otherwise entitled to be excepted from the mandatory arbitration provision of the RLA, is erroneous.

In affirming the District Court the Court of Appeals relied on *Air Line Pilots v. O'Neill*, 499 S. Ct. 65 (1991) as a standard for evaluating fair representation that has not been violated here. However, that case involved an apparently disadvantageous settlement to certain striking pilots in negotiations with the employer. In this case, there is no duty of representation to the retirees so that they have no standing to bring a DFR suit. Second, where there are allegations of the nature made here that the union is in league with the employer, a DFR claim need not be filed. *See Kaschak v. Conrail*, 707 F.2d 902 (6th Cir. 1983).

In *Kaschak v. Consolidated Rail Corporation*, 707 F.2d 902 (6th Cir. 1983), plaintiff had been an employee of

Conrail, but claimed he had been wrongfully discharged. He claimed to have filed a timely request for grievance procedures, but that his union had failed to process the grievance in accordance with the time requirements in the bargaining agreement. Despite Kaschak's claims of improprieties on the part of his union and Conrail, his action was filed solely against Conrail for violations of the bargaining agreement. After the trial court's dismissal, the Sixth Circuit conducted a full review of the RLA framework and interpretive case law and decided that under the circumstances Kaschak's claim fell outside the normal statutory scheme and that relegating him solely to a Board-administered remedy would only serve to undermine the compensatory principle underlying not only the RLA, but all labor relations schemes. *Kaschak*, 707 F.2d at 908. *See also Miklavic v. USAir*, 21 F.3d 551 (3d Cir. 1994).

Among factors[7] found determinative in *Kaschak* were the employer's duty to act in accord with the terms of the

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7. The *Kaschak* court pointed out that the "RLA contemplates the presence of three entities: the employer, the individual employee and the union as representative of the collective employees." *Kaschak* at 909-910. It further stated that the rights of each are not co-extensive and that absent separate enforcement rights, there would be no check on possible collusion between the employer and the union to the detriment of all of the individuals. *Id.* at 910. In the instant case, it is unquestionable that the union and the carrier are arrayed against all appellants. Despite this situation, the District Court, feeling itself bound by its reading of *Pennsylvania R.R. v. Day*, based its dismissal partially on the absence of a count against ALPA for failure of its duty of fair representation. *Kaschak* recognizes that the claims against the union are sufficient to permit the court to have jurisdiction even without a DFR count. Perhaps more importantly, *the retired pilots have no cause of action for*

(Cont'd)

agreement, the unquestioned capacity of the courts[8] to enforce the employer's obligation, and whether a denial of jurisdiction in the court would prove the rights of the employee under the RLA to be illusory. In the instant case, it was futile for appellants to seek to exhaust their administrative remedies and to deny them access to the court is to make their rights illusory and deprive them of a meaningful decision fairly arrived at.

Both USAir and ALPA are openly and unequivocally adverse to the appellants' position and have stated as much: the company because tens of millions of dollars of its money are at stake if dividends are included in the Prior Plan calculation, and ALPA because the Prior Plan pilots are a small group of mostly retired pilots (whom they do not represent) and payment to them would diminish benefits available to presently employed pilots who comprise nearly all of its membership. *See Licensed Division District No. 1 MEBA/NMU AFL-CIO v. Defries*, 943 F.2d 474 (4th Cir. 1991).

USAirways, Inc., with over 5,000 active pilots, cannot be relied upon to represent the interest of the retired pilots

(Cont'd)
DFR against ALPA because the union has no duty at all toward them. Since most of the appellants cannot allege a valid DFR count against ALPA, to deny access to the court because of this impossibility is a clear denial of due process of law.

8. In the instant case, it is improbable that a Board comprised of airline pilots — experts in flying and perhaps the operation and working conditions of an airline — has expertise in and is more capable of dealing with a securities issue than a court which deals with issues of ERISA benefits and stock market performance indices on a regular basis.

and about fifty still-active pilots who worked under a contract applying, by its terms, only to them. Significantly, the inability of retirees to obtain any semblance of a fair hearing was so clear that USAir admitted in its Answer and in Interrogatories that the arbitration process would be futile.[9] The Union, of course, has neither incentive nor requirement to fairly represent these former pilots, who are neither union members nor eligible to become union members, and whose interests are, in fact, adverse to present union members.

When the circumstances here are considered, it is manifest that any efforts by petitioners to proceed formally with contractual or administrative remedies would be wholly futile. Accordingly, jurisdiction is properly found in the courts for petitioners' causes of action. Since the decision here directly conflicts with the decision in *Kaschak*, certiorari should be granted to resolve this conflict in the circuits.

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9. The complaint alleges in paragraph 3 that resorting to the Retirement Board would be futile. Defendants' Answer admits in paragraph 3 that it would be futile. A clearer statement of futility, agreed upon by all parties who are familiar with the composition of the Board, could not be had.

III. PETITIONERS WERE DENIED THEIR DUE PROCESS RIGHTS TO A FAIR HEARING BY AN IMPARTIAL TRIBUNAL WHERE THE RAILWAY LABOR ACT REQUIRED THAT PETITIONERS' RETIREMENT BENEFITS BE DETERMINED BY AN ARBITRATION PANEL CHOSEN BY THE EMPLOYER AND A UNION WHOSE INTERESTS WERE ADVERSE TO THE PETITIONERS' AND WHICH NO LONGER REPRESENTS MOST OF THE INDIVIDUAL PETITIONERS.

An award by the Retirement Board is final, and is not a private matter of contract, but rather is mandated by §§ 143 and 184 of the RLA. Such a mandatory imposition of the authority of the Retirement Board renders its acts government action of a judicial nature and, therefore, subject to constitutional due process requirements. *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616 (1959); *Pennsylvania Railroad Co. v. R.R.*, 352 U.S. 480 (1957) (recognizing that the decisions of the Boards are subject to review on due process ground).[10] The right to a fair and impartial tribunal is one of the most basic of due process

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10. This due process requirement is universally recognized by the Federal Courts of Appeal. *See, e.g., English v. Burlington Northern R.R. Co.*, 18 F.3d 741 (9th Cir. 1994); *Holly v. Eastern Airlines Inc.*, 511 F.2d 663 (5th Cir. 1963); *Steffans v. Brotherhood of Railway Airline and Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986); *Hornsby v. Dobard*, 291 F.2d 483, 487 (5th Cir. 1961); *D'Elia v. New York, New Haven & Hartford R. Co.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F.2d 701 (2nd Cir. 1964); *Edwards v. Capital Airlines, Inc.*, 176 F.2d 755 (D.C. Cir. 1949); *Elmore v. Chicago & Illinois Midland Railway Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

rights. As stated in *In re Murchison*, 349 U.S. 133, 136 (1956):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.**

Offutt v. United States, 348 U.S. 11 (1954) (emphasis added).

With respect to the RLA, the Fifth Circuit has held that a Railroad Labor Board decision under the RLA could be challenged on the grounds that the agreement between the union and the carrier might justify an inference of bias or partiality by reason of interests which would deny the petitioners the fair and impartial tribunal required by the due process clause of the Fifth Amendment. *Hornsby v. Dobard*, 291 F.2d 483, 487 (5th Cir. 1961).

The USAir-ALPA controlled Board makes the above-noted violations of due process appear even-handed forums by comparison. The USAir-ALPA Board will have four members (actually all of the members because there can be no deadlock requiring a fifth, "impartial" member) employed by USAir and ALPA, paid for their services on the Board by USAir and ALPA, possessed of deep-seated financial interests adverse to petitioners, and with no possibility of sanction by the retirees, such as in a union election. The Board is bought and paid for by USAir and ALPA. The alignment designed by Congress to be

structurally adverse, to grapple with work conditions and rates of pay by the opposing interests, simply does not exist here because the intended adversaries — the carrier and the union — are not adverse. In short, petitioners have no chance. This is not some speculative paranoid worldview, but is the considered opinion of USAir, ALPA, petitioners and the District Court.

It is not required that the board be impartial and disinterested, rather it is set up to be *bipartisan*. *Ferris v. Alaska Airlines, Inc.*, 113 F. Supp. 907, 910 (W.D. Wash. 1953); *see generally Union Pacific Railroad v. Sheehan*, 439 U.S. 93 (1978). In the instant case, however, it is not bipartisan, but is to be selected by two parties antagonistic to petitioners. Both ALPA and the airline have enormous economic interests in denying proper benefits to the unrepresented retirees. It cannot be denied, even by the most hardened cynic, that awarding judges millions of dollars — as will occur here by the selection of arbitrators — for their decision, is not corrupt. This type of corruption must be that contemplated in *Sheehan*.

Other courts have found that the denial of due process is a separate and independent ground. In *Edelman v. Western Airlines, Inc.*, 892 F.2d 839 (9th Cir. 1989), a flight attendant raised the claim that the procedure before the board deprived her of procedural due process. The *Edelman* court was quick to analyze *Sheehan* to determine that a due process challenge does provide an independent basis for the court's jurisdiction. *Accord Steffens v. Brotherhood of Railway Airline and Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986) and *Hayes v. Western Weighing*, 838 F.2d 1434 (5th Cir. 1988); *contra Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985).

It is a "well established principle that when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99 (1977). Having concluded that neither the RLA nor its legislative history foreclosed judicial review of constitutional claims, the *Edelman* court held that a constitutional challenge constituted a ground, separate from those set forth in *Sheehan*, upon which a federal court has jurisdiction to review decisions of a board. *Edelman*, 892 F.2d at 842.

The court then considered what sort of process was due. Starting with the proposition that "Due process is flexible and calls for such procedural protections as the particular situation demands" *Matthews v. Eldridge* 424 U.S. 319 (1976). The *Edelman* court considered claimant's interest in the outcome the government's interest in having disputes settled efficiently as follows:

> The Board itself is structured to protect the interests of a grievant like *Edelman*. The presence of two Union members of the Board helps ensure that the interests of a fellow Union member will be protected and that grievance proceedings will be conducted fairly . . . That is especially true here where *Edelman* was represented by a member of the Union as well as by her attorney.

Petitioners here will have no such protection nor will they have a tribunal that may protect their interests.

This view is supported by *Haney v. Chesapeake & Ohio Railroad*, 498 F.2d 987 (D.C. Cir. 1974), in which the court

considered the retroactive application of *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), to a separation pay dispute. The *Haney* court conducted a reasoned analysis of the facts to assure that no injustice was presented. Indeed the court noted that "Justice requires a fair tribunal," although it found in Haney's case that his particular claims of lack of fairness were weak and speculative.

Here both union and employer have taken a position in favor of their own economic interests, which are adverse to petitioners. There can be no fair tribunal for petitioners when their foes pick both sides of an intended bipartisan panel.

Finally, the issue in this case is unique and very likely applicable only to the Prior Plan participants. There is little likelihood that this issue could ever arise again between USAir and ALPA. The circumstances in this case are so egregious and it is so apparent that no board selected by USAir and ALPA can be a fair tribunal with respect to these issues, that the absolute denial of a fair tribunal should require this Court to grant the petition for certiorari and find jurisdiction in the District Court.

CONCLUSION

The denial of petitioners' rights to have a fair hearing on matters significant to them, which cannot be justly resolved in an arbitration controlled by petitioners' two adversaries — the company and the union — violates long-settled principles of fundamental fairness. The petition for a writ of certiorari should be granted and the split of authority between the circuits and with the decisions of this Court should be resolved.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED FEBRUARY 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1998

Civil Action No. 95-0990

No. 98-7110

M.A. Everett, et al.,

Appellants

v.

US Airways Group, Inc., et al.,

Appellees

On Appeal from the United States District Court
for the District of Columbia

Before: WALD, HENDERSON and RANDOLPH, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the

issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). Accordingly, it is

ORDERED that the judgment from which this appeal has been taken be affirmed substantially for the reasons stated in the district court's opinion. *See Everett v. US Airways Group, Inc.*, 927 F. Supp. 478, 482 (D.D.C. 1996). Because the appellants did not claim that the Airline Pilots Association, International (ALPA), breached its duty of fair representation and have not made ALPA a party to this case, the lower court distinguished their duty of fair representation claim on that basis. On appeal, the appellants make clear that, while they are not pursuing a formal claim of fair representation, they can nonetheless litigate their claims in district court based on a more general allegation of union impropriety. *See Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983). We reject the applicability of that case to the facts here as well. *See ALPA v. O'Neill*, 499 U.S. 65, 78 (1991). We also reject the appellants' claim that US Airways repudiated the arbitration process by failing to respond to appellant Dickinson's claim for benefits, thereby entitling them to proceed in district court. Dickinson's claim did not itself trigger arbitration. *See Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254, 262-63 & n.10 (1962).

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

s/ Mark J. Langer
Mark J. Langer, Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JULY 11, 1996 AND FILED JULY 12, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-0990 (PLF)

M.A. EVERETT, *et al.*,

Plaintiff,

v.

USAIR GROUP, INC., *et al.*,

Defendant.

ORDER

Plaintiffs have moved the Court to reconsider its Opinion of May 31, 1996, in which the Court found that it lacked subject matter jurisdiction over plaintiffs' claims for breach of fiduciary duty and failure to pay benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Plaintiffs again argue that jurisdiction lies in this Court, notwithstanding the exclusive jurisdiction of the Retirement Board under the mandatory arbitration provisions of the Railway Labor Act, 45 U.S.C. §§ 181 *et seq*., because arbitration would be futile. Plaintiffs also argue that their failure to name the Airline Pilots Association ("ALPA") as a defendant does not preclude

treating this case under a duty of fair representation ("DFR") rubric. Finally, plaintiffs assert that to compel them to arbitrate before the Retirement Board would violate their due process rights.

The Court has carefully considered all the cases cited by plaintiffs in their motion for reconsideration, most of which had not previously been brought to the Court's attention. Nearly every case cited that addresses the jurisdictional issue is a DFR case against a union or a hybrid-DFR case against both a union and an employer. The case before the Court, however, is neither; it is a suit against an employer only. The Court made clear in its May 31 Opinion that DFR and hybrid-DFR cases may be brought in district court despite the exclusive jurisdiction of the arbitral tribunal under the RLA only because where the union is a party, the case is no longer solely a "dispute[ ] between an employee or group, of employees and a carrier or carriers." *Glover v. St. Louis R.R.*, 393 U.S. 324, 328 (1969). In addition, and as a separate legal matter, in DFR and hybrid-DFR cases futility may excuse the exhaustion of administrative remedies under the RLA and/or the employees' collective bargaining agreement. *Id.* at 329-30. The instant case raises no DFR claims and no hybrid claims, and the union is not a party. The DFR or hybrid-DFR exception to the RLA's exclusive jurisdictional and exhaustion requirements therefore does not apply.

Plaintiffs argue that merely because the union is not a party does not preclude the Court from treating the case as if it were a hybrid-DFR case because plaintiffs have alleged various conflicts of interest on the part of the union. They

cite *DelCostello v. International Brotherhood of Teamsters*, 460 U.S. 151, 164-65 (1983), and *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990). These two cases, however, involved actions under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*. As the Seventh Circuit has noted, hybrid-DFR cases under the RLA differ from those brought under the NLRA because the RLA provides no independent jurisdictional basis for the suit against the employer. *Steffens v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 797 F.2d 442, 445 n.2 (7th Cir. 1986). None of the cases cited by plaintiffs requires or even permits a conclusion other than the one previously reached by the Court.

Finally, the Court rejects plaintiffs due process challenge to the requirement that the retired pilots arbitrate their claims before a Retirement Board composed of two union-selected members and two employer-selected members. As the Court discussed in its Opinion, the Supreme Court in *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551-52 (1959), specifically contemplated that retired workers will proceed before arbitration tribunals composed of union- and management-selected members. To hold that the composition of such a tribunal deprives retired workers of their due process rights would directly contradict the holding in *Pennsylvania R.R. v. Day*.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for reconsideration is DENIED.

Appendix B

SO ORDERED.

s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 7/11/96

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MAY 31, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-0990 (PLF)

M.A. EVERETT, *et al.*,

Plaintiffs,

v.

USAIR GROUP, INC., *et al.*,

Defendants.

OPINION

This action is brought by 481 retired and active USAir pilots against USAir, Inc., USAir Group, Inc., and the Retirement Income Plan for Pilots of USAir, Inc., the pension plan administered by USAir, Inc. Plaintiffs allege that defendants have (1) breached their fiduciary duties under Section 1104 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, (2) failed to pay benefits due under ERISA, 29 U.S.C. §§ 1054(g) and 1132(a)(1)(B), and (3) violated ERISA's disclosure provision, 29 U.S.C. § 1022, and the applicable regulations, 29 C.F.R. §§ 2520.102-2, 102-3. 104b-1. All defendants have moved to dismiss or for summary judgment, and defendant USAir Group also has sought

dismissal on the ground that it is not a benefit plan, a plan administrator or a fiduciary under ERISA.

I. FACTUAL BACKGROUND

Prior to 1972 the pilots of USAir (then known as Allegheny Airlines) had a mixed defined benefit/defined contribution plan ("the Prior Plan"). The plan had a variable component based on the performance value of a group of actual diversified stocks, including reinvested dividends (the "Variable Fund"). Pilots accumulated units in the plan, and the value of each unit was based on the value of this variable fund, i.e., its accumulated assets plus reinvested dividends. Pls.' Opp'n at 1-2; Defs.' Mot. at 6. In 1972, the pilots and USAir (then Allegheny Airlines) negotiated a new collective bargaining agreement ("CBA") and signed a Letter of Agreement changing the method of calculating certain pension benefits, effective December 1, 1972. Letter of Agreement between Allegheny Airlines, Inc. and the Air Line Pilots at 121-33, Def's Ex. 2 at FUW5329-35. In 1973, ALPA and Allegheny Airlines amended the pension plan in conformity with the 1972 Letter of Agreement. Amendment to the Retirement Income Plan for Pilots of Allegheny Airlines, Inc. ¶ 4.3(C), Defs.' Ex. 3.

Under the 1972 Letter of Agreement and the 1973 amended plan, participants covered by the Prior Plan were entitled to a "minimum benefit" to maintain the value of their pensions. Defs.' Mot. at 4; Pls.' Opp'n at 1-3. In calculating the minimum benefit, the value of each variable unit was no longer measured in terms of the actual value of the Variable Fund but instead by the performance of the

Appendix C

Standard and Poor's 500 Index. A key provision of the amended plan stated that a participant's retirement income under the new plan

> shall not be less than that to which [a participant] would have been entitled at his Retirement . . . assuming . . . that had the Variable Retirement Income Plan remained in effect, the investment performance thereunder would be equal to the investment performance of the Standard and Poor's 500 stock index (unadjusted for dividends).

Amendment to the Retirement Income Plan for Pilots of Allegheny Airlines. Inc. ¶ 4.3(C), Defs.' Ex. 3.[1] In order to

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1. In similar language, the 1972 Letter of Agreement provided:

> (1) The benefit which would have been paid under the Prior Plan is computed based on the pilot's actual earnings. For the variable portion of this benefit the variable unit value for any future year shall be computed as if the variable fund assets had achieved investment performance equal to the performance of the Standard and Poor's 500 Index.
>
> (2) For a pilot at retirement, the greater of the benefits [under the current plan or the Prior Plan] shall be payable.

Letter of Agreement between Allegheny Airlines, Inc. and the Air Line Pilots § 2(E)(1)-(2) at 124, Def.'s Ex. 2 at FUW5331. The parties agree that there is no substantive difference between the meaning of the 1972 Letter of Agreement and the 1992 collective (Cont'd)

ensure that participants received the same or higher benefits under the amended plan, a phantom value under the Prior Plan was to be calculated and compared with the value under the new plan. Pilots who were covered under the Prior Plan are entitled to benefits calculated by the more favorable method under the two plans. Letter of Agreement between Allegheny Airlines, Inc. and the Air Line Pilots at 124, Def.'s Ex. 2 at FUW5331; *see also* USAir Pilots' Agreement § 28(B)(1)(k) (July 9, 1992), Pls.' Ex. 4, Defs.' Ex. 14.

In 1991, USAir proposed an amendment to the new plan that would have made explicit that dividends would not be included in the calculation of benefits under the 1973 amended plan. The Air Line Pilots Association ("ALPA"), the pilots' union, initially agreed, but several pilots objected and ALPA never signed the agreement letter.

This suit revolves around the interpretation of the 1973 amended plan's language, specifically whether and in what manner dividends are to be included for the purposes of calculating the qualifying pilots' benefits. Plaintiffs argue that in light of the intent of the 1972 CBA and the 1973 amended plan to provide retirement income no less than that to which they would have been entitled under the Prior Plan, dividends should be included in the calculation of investment performance, and that the phrase "unadjusted for dividends" included in the 1973 amendment means that

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(Cont'd)
bargaining agreement. USAir Pilots Agreement § 28(B)(1)(k)(2) (July 9, 1992), Pls.' Ex. 4. Plaintiffs also specifically decline to argue that the 1973 plan amendment constituted an impermissible amendment to the CBA. Pls.' Opp'n at 16.

the S&P investment performance shall not be reduced by the amount of dividends that hypothetically would have accumulated. Otherwise, plaintiffs argue, the 1973 amended plan would have resulted in a significant loss to the pilots who had been governed by the Prior Plan and there is no evidence that this was contemplated.[2]

Defendants assert that the plain language of the 1973 amended plan, "unadjusted for dividends," means that the fund is to be evaluated on the basis of the market value of the S&P Price Index and dividends are not to be included. Defendants point to evidence that purportedly shows that they have consistently interpreted the plan this way since 1973, that two independent actuarial firms came to the same conclusion, and that ALPA agrees with this interpretation.

Plaintiffs respond that ALPA's views should carry no weight because ALPA's interests are in conflict with plaintiffs' interests since the inclusion of dividends in the calculation of qualifying pilots' pensions would cost the pension fund millions of dollars and would benefit only retired pilots who are not an active part of ALPA's

2. Plaintiffs offer the affidavit of Carl Colbath, who was one of the negotiators in 1972, Pls.' Ex. 1, a 1993 letter from Donald Reubert, another negotiator, Pls.' Ex. 20, a 1977 letter from USAir's then-Treasurer and plan administrator, H.L. Dyer, Pls.' Ex. 28, as well as evidence that purportedly shows that USAir did not definitively decide to exclude dividends from the calculation until 1989. The language of the Summary Plan Descriptions ("SPD") has changed over the years: the 1973 SPD, like the 1973 amended plan but unlike the 1972 Law of Agreement, said "unadjusted for dividends"; the 1988 SPD did not mention dividends at all; and the 1991 SPD says "exclusive of dividends."

membership, or those few pilots who are soon to retire and who constitute a very small fraction of ALPA's membership, all at the expense of younger, active ALPA members. Plaintiffs emphasize that the retired pilots, who would be the largest beneficiaries of a favorable ruling for plaintiffs, are not actively represented by ALPA and that although at least one pilot requested that ALPA file a grievance on the pilots' behalf over this dividend issue, ALPA declined to do so. Declaration of Marvin A. Everett ("Everett Decl.") ¶ 2 (March 18, 1996), Pls.' Ex. 34.

Defendants raise a number of arguments in support of their motion to dismiss or for summary judgment based on, *inter alia*, the applicable statutes of limitations for various claims and as to various plaintiffs, the standing of those plaintiffs who received lump sum benefits, the reasonableness of USAir's interpretation of the plan, and the Court's jurisdiction to interpret a collective bargaining agreement in view of the dispute resolution mechanism established by Congress in the Railway Labor Act. Defendants also seek attorneys' fees and costs, and plaintiffs seek further discovery under Rule 56(f), Fed. R. Civ. P. Because the Court finds the jurisdictional issue under the Railway Labor Act to be dispositive, it does not reach the other arguments.[3]

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3. USAir Group, Inc. has moved separately to dismiss or for summary judgment, arguing that, although it is USAir's parent company, it lacks control over the pension plan and thus does not qualify as a plan, a plan administrator or a fiduciary under ERISA. 29 U.S.C. § 1002(21)(A); *see* Declaration of Michelle Bryan ¶ 2 (Attorney for USAir) ("USAir Group, Inc. has no relationship to the Plaintiffs or to the Retirement Income Plan . . . .").

(Cont'd)

Appendix C

II. THE RAILWAY LABOR ACT

Subchapter II of the Railway Labor Act, 45 U.S.C. §§ 181 *et seq.*, governs disputes between airline carriers and their employees. Section 184 requires each carrier to establish a board of adjustment or system board to decide "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 184.[4] That statutory grievance procedure is "mandatory,

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(Cont'd)

While the fact that USAir and USAir Group share their management and board alone does not demonstrate that USAir Group has discretionary control over the pension plan, *see Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 133-35 (7th Cir. 1984), discovery in this case has been limited by Court Order and it therefore is premature to determine whether USAir Group in fact ever exerted control over the management of the plan. As the Court concludes that the central issues in this case are mandatorily arbitrable under the Railway Labor Act, it will not rule on USAir Group's motion to dismiss at this time.

4. The pilots' retirement plan provides for the creation of a Retirement Board to hear "all disputes arising out of the application and interpretation of the Plan." Retirement Income Plan for Pilots of USAir, Inc. (effective Jan. 1, 1994) § 14.3, Defs.' Ex. 13; Letter of Agreement #12 §§ 1.1, 3.1, Defs.' Ex. 14; *see also* Amendment to the Retirement Income Plan for Pilots of Allegheny Airlines, Inc. (effective Dec. 1, 1972) § 9. 1 (d), Defs.' Ex. 3. The Retirement Board consists of two members selected by USAir and two members selected by ALPA. Any participant of the plan may submit to the Retirement Board any dispute concerning his or her participation in or benefits under the plan.

exclusive and comprehensive." *Air Line Pilots Ass'n. Int'l v. Delta Air Lines*, 863 F.2d 87, 88 (D.C. Cir. 1988) (quoting *Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. 33 (1963)), *cert. denied*, 493 U.S. 821 (1989); *see Air Line Pilots Ass'n. Int'l v. Northwest Airlines*, 627 F.2d 272, 275 (D.C. Cir. 1980). The RLA's mandatory arbitration procedures apply only to issues arising out of the interpretation of the collective bargaining agreement and not to independent statutory claims under ERISA. *Air Line Pilots Ass'n. Int'l v. Delta Air Lines*, 863 F.2d at 91 & n.2. 93-94; *Air Line Pilots Ass'n. Int'l v. Northwest Airlines*, 627 F.2d at 277. Contractual "doubts about the arbitrability of issues[, however,] should be resolved in favor of coverage." *Air Line Pilots Ass'n. Int'l v. Delta Air Lines*, 863 F.2d at 93 (citing *Northwest Airlines v. Air Line Pilots Ass'n. Int'l*, 808 F.2d 76, 82 (D.C. Cir. 1987)). If a dispute is mandatorily arbitrable under the Railway Labor Act, this Court lacks jurisdiction to consider it.

Plaintiffs raise three arguments as to why the Railway Labor Act does not deprive this Court of jurisdiction over some or all of their claims. First, two of plaintiffs' claims are independent claims under ERISA that do not turn on the interpretation of the collective bargaining agreement. Second, most of the plaintiffs (approximately 345 out of 481) are retired and the Railway Labor Act does not govern retired pilots. Third, since the Retirement Board is made up of an equal number of USAir representatives and ALPA representatives, and because ALPA has stated that it does not represent the retired pilots in this matter, has refused to file a grievance on plaintiffs' behalf and has announced its agreement with USAir's interpretation of the CBA, it would

be futile to arbitrate the dispute and plaintiffs therefore are not required to do so.

A. Independent ERISA Claims

As a general matter, the parties agree that the pilots' retirement benefits are governed by the 1972 collective bargaining agreement and plaintiffs do not assert that the pension plan is, by its terms, exempt from the RLA's mandatory arbitration provisions. *See Air Line Pilots Ass'n. Int'l v. Delta Air Lines*, 863 F.2d at 92-93; *cf. Bonin v. American Airlines*, 621 F.2d 635, 639 (5th Cir. 1980). Plaintiffs nevertheless contend that two of their three claims under ERISA are sufficiently independent from any interpretation of the collective bargaining agreement to provide this Court with jurisdiction.

Plaintiffs assert three separate claims: failure to pay benefits due under ERISA, breach of fiduciary duty under ERISA, and violation of ERISA's disclosure provisions. Plaintiffs' central contention is that USAir purposely misinterpreted the collective bargaining agreement and, thus, the pension plan to exclude dividends from the calculation of plan benefits. In the Court's view, this is precisely the sort of interpretive issue encompassed by the RLA's mandatory arbitration provisions. *See Air Line Pilots Ass'n. Int'l v. Northwest Airlines*, 627 F.2d at 274-75. Plaintiffs' claim for benefits arises directly out of this interpretive question and the Court therefore lacks jurisdiction over it.

Plaintiffs' other two claims present a more complex picture. The court of appeals for this Circuit has held that an independent ERISA claim may arise out of the same facts as an arbitrable claim and that a district court his jurisdiction over that sort of separate statutory claim if it is genuinely independent of the correct construction of the collective bargaining agreement. *Air Line Pilots Ass'n. Int'l v. Northwest Airlines*, 627 F.2d at 277-78. In the *Northwest* case, ALPA alleged that Northwest unreasonably delayed payments due under the collectively bargained pension plan, thus accumulating interest to itself and thereby violating the terms of the plan as well as Northwest's fiduciary duty under ERISA to act only for the benefit of plan participants. The court held that ALPA's fiduciary duty claim was an independent, nonarbitrable claim because even if Northwest's conduct was permissible under the proper interpretation and application of the plan, it still might have constituted a breach of Northwest's fiduciary duties under ERISA. *Id.* at 277.

By contrast, plaintiffs in this case have failed to articulate any claims for breach of fiduciary duty that are sufficiently independent of the central arbitrable contract interpretation issue to provide this Court with jurisdiction. Plaintiffs contend that defendants breached their fiduciary duties by improperly calculating plan benefits and by denying plaintiffs benefits to which plaintiffs are entitled. *See* Complaint ¶¶ 30, 36-41. Each of these claims, however, turns on whether USAir's interpretation of the plan is incorrect or misleading. If USAir's interpretation is correct, plaintiffs' claims for breach of fiduciary duty necessarily will fail. Conversely, if plaintiffs' interpretation is correct,

plaintiffs then will be able to maintain an action for breach of fiduciary duty. *Air Line Pilots Ass'n. Int'l v. Delta Air Lines*, 863 F.2d at 96. In either case, the proper interpretation of the collective bargaining agreement and pension plan must be decided first, and that issue is within the exclusive jurisdiction of the Retirement Board.

The Court concludes, however, that plaintiffs have stated an independent claim under 29 U.S.C. § 1022 for violation of ERISA's disclosure provisions. Section 1022 requires that a Summary Plan Description ("SPD") be provided to all plan participants. Such an SPD

> shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant . . . .

29 U.S.C. § 1022(a)(1). Section 1022 further requires that the SPD shall contain, *inter alia*, "a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; [and] the source of financing for the plan . . . ." 29 U.S.C. § 1022(b); *see also* 29 C.F.R. §§ 2520.102-2, 102-3, 104b-1.

Appendix C

Even if USAir's interpretation of the CBA and the plan is correct, USAir had an independent duty to provide an SPD that was "calculated to be understood by the average plan participant" and that would "reasonably apprise such a participant" that dividends were not to be included in the benefits calculation. Plaintiffs argue that USAir misled plan participants with the information that it provided and the examples of benefits that it used, that pilots relied on those representations, and that some pilots might have made different retirement decisions had they known that their retirement income would not reflect reinvested dividends. *See* Complaint ¶¶ 27, 34-35, 53. In fact, plaintiffs have produced evidence suggesting that some pilots may not have been aware that USAir was calculating benefits on a no-dividend-reinvestment basis. *See* Letter from Carl Colbath to Terry Dickinson (April 5, 1994). Pls.' Ex. 1; Letter from J. Joseph Rahll to Captain Owen Brown (Jan. 24, 1994), Pls. Ex. 7; Letter from Donald Reubert to Captain Peter Gauthier (Oct. 9, 1993), Pls.' Ex. 20; *see also* Letter from Deloitte & Touche to ALPA (June 1, 1993), Pls.' Ex. 21 ("The only area of concern which may deserve some attention is the lack of definition in the 1992 proposed working agreement as to whether or not the Standard & Poor's index is to include dividends."). In light of this controversy, the three words in the 1973 SPD that would have constituted notice of the basis of USAir's calculation — "unadjusted for dividends" — might or might not suffice as a matter of law under ERISA to fulfill USAir's duty to disclose.

Moreover, the three crucial words changed over the years: the 1973 SPD, like the 1972 CBA, used the phrase

"unadjusted for dividends"; the 1988 SPD did not mention dividends at all; and the 1991 SPD used the phrase "exclusive of dividends." Defs.' Ex. 1 at FUF0607; Defs.' Ex. 32 at FUF0243; Defs.' Ex. 33 at FUF0202. Accordingly, the Court finds that plaintiffs have stated an independent claim for the violation of ERISA's disclosure provisions over which the Court has jurisdiction. This Court will stay its own proceedings, however, until the end of the arbitral process. *See Air Line Pilots Ass'n Int'l v. Northwest Airlines*, 627 F.2d at 278.

B. RLA Coverage of Retired Employees

Plaintiffs argue that even if two of their claims normally would be within the exclusive jurisdiction of the Retirement Board, this Court has jurisdiction over all the claims in this case, at least as to a majority of the plaintiffs, because retired pilots are not "employees" under the RLA. Plaintiffs rely on *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), in which the Supreme Court held that retired workers are not "employees" under the National Labor Relations Act's collective bargaining provisions. Plaintiffs' attempted analogy between coverage under the NLRA and under the RLA fails, however, because the Supreme Court has squarely held that the RLA's mandatory arbitration provisions do apply to retired workers. *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551-52 (1959). While *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass* is a more recent decision, the Supreme Court gave no indication there or in any other opinion that it intended to overrule *Pennsylvania R.R. v. Day*.

Appendix C

The Court in *Pennsylvania R.R. v. Day* was very clear in its reasoning with respect to retired workers. It wrote:

> All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating a claim for compensation from for work performed while on active duty. . . . The same collective bargaining agreement must be construed with the same need for uniformity of interpretation and orderly adjustment of differences. . . . The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated.

Pennsylvania R.R. v. Day, 360 U.S. at 551-52. *See also Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) (applying the RLA's mandatory arbitration provisions to retired employee who left employment before filing suit so long as claim arose out of employment relationship); *Leu v. Norfolk & Western R.R. Co.*, 820 F.2d 825, 831 n.10 (7th Cir. 1987) (same). Since plaintiffs' claims, including those of the retired pilots, all arise out of their employment relationship with USAir, the RLA governs and the Court lacks jurisdiction.

C. Futility

Finally, plaintiffs argue that grieving their claims before the Retirement Board would be futile because it is in the

interest of ALPA's active members to agree with USAir over the interpretation of the plan rather than with the retired pilots, who are not part of the collective bargaining unit, in order to keep millions of additional dollars available for the active pilots' ultimate retirement. Because the Retirement Board is comprised of two ALPA members and two USAir members, with ALPA and USAir in agreement about the meaning of the CBA, plaintiffs maintain that they cannot succeed before the Board. Defendants concede that plaintiffs will almost certainly lose before the Retirement Board, but argue that this is not the sort of futility contemplated by the Supreme Court in the limited exception it recognized in *Glover v. St. Louis R.R.*, 393 U.S. 324 (1969), the case on which plaintiffs principally rely. The Supreme Court in *Glover* excused African-American employees from the requirement that they arbitrate their grievances against both their union and their employer because of demonstrated racial hostility on the part of the union and management alike.

Although plaintiffs argue that the futility exception gives this Court jurisdiction over their otherwise arbitrable claims, the Supreme Court in *Glover*, distinguishing analytically between the exhaustion requirement and the mandatory arbitration requirement, noted that futility may be a defense to exhaustion but not to mandatory arbitration which is a jurisdictional matter. *Glover v. St. Louis R.R.*, 393 U.S. at 329-30. *See also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972) ("[I]n at least some situations the [Railway Labor] Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before

resorting to another."). In light of this distinction, even a showing of genuine futility might not save plaintiffs' claims.

Plaintiffs point out that in cases involving duty of fair representation ("DFR") claims by union members against their unions, the National Railroad Adjustment Board lacks jurisdiction and exhaustion is not required. *See Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) ("It is beyond civil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts."); *Glover v. St. Louis R.R.*, 393 U.S. at 328-29 ("[J]urisdiction of federal courts [is] clear . . . [where] the suit [is] one brought by the employees against their own union . . ." and "the exhaustion requirement is subject to a number of exceptions.").[5] The rationale is that individual employees cannot expect a fair hearing from adjustment boards where the employees' putative representative, the union, is itself the offending party. *See Richins v. Southern Pacific Co.*, 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). In limited instances, the bringing of a DFR claim will permit related claims against employers that would normally be arbitrated to come under the district court's jurisdiction. *Glover v. St.*

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5. *See also Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1190-91 (3d Cir. 1984); *Richins v. Southern Pacific Co.*, 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Schum v. South Buffalo R.R.*, 496 F.2d 328, 330 (2d Cir. 1974); *Porter v. Atchison, Topeka and Santa Fe R.R. Co.*, 768 F. Supp. 571, 575 (N.D. Tex. 1991).

Louis R.R., 393 U.S. at 329.[6] Plaintiffs assert that this rationale should govern the instant case.

This, however, is not a DFR case nor have plaintiffs established that the facts of this case raise the same conflict of interest and representation issues as in a DFR case or even a hybrid DFR-contractual case.[7] Plaintiffs have chosen not to pursue a DFR claim against ALPA, and ALPA is not even a party to this case. Plaintiffs cannot invoke the jurisdiction of this Court based on a hypothetical unpursued

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6. The case law admittedly reflects some debate over the extent of *Glover*'s futility exception as applied to contractual disputes between employers and employees where those disputes are related to and arise in connection with DFR claims brought by union members against their union. The Tenth Circuit, for example, has held that district courts have jurisdiction over hybrid DFR-contractual claims even where they encompass potentially arbitrable issues, *Richins v. Southern Pacific Co.*, 620 F.2d at 763, while the Third Circuit has stated that "[w]e believe that *Glover* is not applicable when the basis of the claim is primarily construction and interpretation of existing collective bargaining agreements." *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 756 n.13 (3d Cir. 1978). In this case, however, plaintiffs have not filed a DFR claim against ALPA and thus this is not a hybrid case which, in the Tenth Circuit's view, would imbue the Court with jurisdiction.

7. Plaintiffs assert, for example, that one pilot filed a grievance that has been ignored, Grievance letter of Captain Dickinson (May 3, 1994), Pls.' Ex. 34, and that plaintiffs asked ALPA to grieve the issue and ALPA refused, noting that ALPA does not represent retired pilots. Everett Decl. ¶ 2. Since plaintiffs are entitled to grieve the issue individually, however, ALPA's refusal to grieve the issue does not excuse plaintiffs' failure to do so.

claim where the limits on federal court jurisdiction under the RLA are so clear.

Moreover, there is a crucial legal difference between the type of bias alleged by plaintiffs and the institutional alignments and structural biases that drove the *Glover* and *Czosek* decisions. Plaintiffs argue that because the majority of plaintiffs are retired and not part of ALPA they are "structural minorities," akin to the African Americans in *Glover* and the furloughed workers in *Czosek*, who cannot expect a fair hearing before the Retirement Board. But to accept this reading of *Glover* would be effectively to ignore the Supreme Court's holding in *Pennsylvania R.R. v. Day*, 360 U.S. at 551-52, that retired workers must proceed before the National Railroad Adjustment Board set up under the RLA. That tribunal, like the Retirement Board here, also consists of union-appointed and carrier-appointed officials. 45 U.S.C. § 153(a). Accordingly, the Court is compelled to reject plaintiffs' futility argument and find that it lacks subject matter jurisdiction over plaintiffs' claims for denial of benefits and for breach of fiduciary duty.

In light of defendants' concession that plaintiffs are highly unlikely to prevail before the Retirement Board, the Court recognizes that this result seems particularly harsh. The Court reads *Pennsylvania R.R. v. Day*, however, to require precisely this outcome. The Supreme Court has determined that retired workers, despite their noninclusion in the collective bargaining unit, must proceed before adjustment boards comprised of union and management representatives. Were this Court to hold that these plaintiffs are structurally disadvantaged because they disagree with

the position of the union that once represented them and therefore are entitled to the protection of *Glover*, *all* retired workers challenging their union's bargaining position could proceed directly to court, exempt from the RLA's dictates, and *Pennsylvania R.R. v. Day* would be a dead letter.

An Order consistent with this Opinion shall be entered this same day.[8]

SO ORDERED.

s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 5/31/96

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8. Because the case is stayed pending arbitration, it is premature to consider attorneys' fees and costs. *Air Line Pilots Ass'n, Inc. v. Northwest Airlines*, 627 F.2d at 278.

APPENDIX D — LIST OF PARTIES IN *EVERETT, et al. v. US AIRWAYS GROUP, INC., et al.*, CIV. NO. 95-990 (PLF) (D.D.C.)

The following persons appeared as parties in *Everett, et al. v. US Airways Group, Inc. et al.*, Civ. No. 95-990 (PLF) (D.D.C.):

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Jack R. Dyer

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Robert W. Frutchey

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Philip A. Fletcher
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Terrence R. Fraser
Ralph S. Fritz

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***DEFENDANTS*:**

US Airways Group, Inc.
US Airways, Inc.
Retirement Income Plan for Pilots of USAir, Inc.

Appendix D

Each of the Defendants in *Everett, et al. v. US Airways Group, Inc., et al.*, Civ. No. 95-990 (PLF) (D.D.C.) is a party to this appeal.

No intervenors or amici appeared in *Everett, et al. v. US Airways Group, Inc., et al.*, Civ. No. 95-990 (PLF) (D.D.C.). The appellees are not aware of any intervenors or amici appearing before this Court.

Supreme Court, U.S.
FILED
JUL 22 1999
OFFICE OF THE CLERK

No. 98-1875

IN THE

Supreme Court of the United States

M.A. EVERETT, *et al.*,

Petitioners,

v.

US AIRWAYS GROUP, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether arbitration boards, or "system boards of adjustment" have exclusive jurisdiction to determine the meaning and application of collective bargaining agreements negotiated under the Railway Labor Act as this Court has previously held. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989); *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959).

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondents certify the following:

1. Respondent, US Airways Group, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

2. The parent company of Respondent US Airways, Inc., is US Airways Group, Inc. The stock of US Airways Group, Inc., is publicly traded; it owns 100% of the stock of US Airways, Inc.

3. Respondent, Retirement Income Plan for Pilots of USAir, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

PARTIES TO THIS PROCEEDING

Appendix D to the petition contains a list of all of the parties to this proceeding. Pet. App. 26a-35a.

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Respondents, US Airways Group, Inc., US Airways, Inc., and Retirement Income Plan for Pilots of USAir, Inc., respectfully submit this brief in opposition to the petition for certiorari.

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not reported but is available at 1999 U.S. App. LEXIS 3979 (D.C. Cir. Feb. 19, 1999). The decision of the district court granting respondents' motion to dismiss (Pet. App. 7a-25a) is reported at 927 F. Supp. 478 (D.D.C. 1996). The order of the district court denying petitioners' motion for reconsideration (Pet. App. 3a-6a) is not reported. The decision of the court of appeals dismissing petitioners' initial appeal in this case is reported at 132 F.3d 770 (D.C. Cir. 1998).

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). For the reasons given by the district court and the court of appeals, the federal courts lack subject matter jurisdiction over the merits of petitioners' claims.

STATUTE INVOLVED

In addition to the statutory provisions set out in the petition, Pet. 1-2, the following statutory provision is involved in this case:

> **45 U.S.C. § 153 First (q):** If an employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of

> employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . . The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

COUNTERSTATEMENT OF THE CASE

In certain circumstances and for certain pilots employed by US Airways, Inc., the Retirement Income Plan for Pilots of USAir, Inc. (the "Plan"), provides a pension benefit based on the "Standard & Poor's 500 stock index (unadjusted for dividends)." Acting as Plan Administrator, US Airways has, for decades, interpreted the phrase to mean that the benefit is calculated excluding dividends.[1]

Petitioners, conversely, claim that "unadjusted for dividends" means that the pension benefit must be calculated

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1. Petitioners suggest that this interpretation is a more recent creation, but that claim is belied by numerous facts in the record, including a memorandum drafted by the US Airways employee responsible for making the calculations just three months after the negotiation of the relevant contractual language. The memorandum confirms that the calculation is based on "the S&P 500 stocks (*without reinvestment of dividends*)." Appendix to this brief at 1a (emphasis added), (Joint Appendix p. A1423 in the court of appeals).

assuming the reinvestment of dividends. The Complaint in this case was premised on the assertion that US Airways Inc. ("US Airways"), has misinterpreted the Plan and thus miscalculated petitioners' pension benefits.

The district court, however, held that it lacked subject matter jurisdiction to construe the labor agreement, and the court of appeals affirmed. That jurisdictional determination — and not the merits of petitioners' contractual construction — is the subject of the petition.

1. ***The petitioners*****:** Petitioners are approximately 430 retired pilots and 65 pilots currently employed by US Airways, Inc., although when the Complaint was filed, roughly one third of the petitioners were flying for the Company. Because petitioners were on the US Airways[2] pilot seniority list as of December 1, 1972, special provisions of US Airways' pilot pension plan apply to them, including the provision at issue in this case.

All US Airways pilots are represented for purposes of collective bargaining by the Air Line Pilots Association, International ("ALPA" or the "Union"). ALPA has disclaimed any interest in representing the retired pilots.

2. ***The Retirement Board*****:** As required by the Railway Labor Act ("RLA"), 45 U.S.C. § 184, the ALPA-US Airways collective bargaining agreement establishes arbitration boards or "system boards of adjustment." One specialized system board created by the agreement is called the Retirement Board. It has exclusive authority to resolve disputes which arise out of the application and interpretation of the collectively bargained terms of the Plan. The Retirement Board is comprised of two

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2. Allegheny Airlines changed its name to USAir in 1979, and in 1997 changed its name again to US Airways. For the sake of simplicity, this brief refers to the airline as US Airways unless the context requires otherwise.

representatives selected by ALPA and two representatives selected by US Airways. When these board members cannot agree on the way to resolve a particular dispute, they appoint an Impartial Referee.

Any Plan participant (including any of the retired petitioners) may submit any dispute he or she might have concerning participation in or benefits under the Plan to the Retirement Board without ALPA's involvement or approval. The decisions of the Retirement Board, with or without an Impartial Referee, are final and binding on all parties. Each US Airways pilot receives a copy of the collective bargaining agreement, and ALPA has periodically publicized the role of the Retirement Board to its members at US Airways.

3. ***The dispute*****:** In the late 1980's, a group of US Airways pilots complained to both US Airways and the Union that the Company had misconstrued the language of the contract regarding their pension rights, and accordingly had miscalculated their retirement benefits. US Airways commissioned the actuarial firm Towers Perrin to study the methods by which the Plan had been administered; Towers Perrin confirmed that the benefit was to be calculated without assuming the reinvestment of dividends.

ALPA also studied the matter, and then commissioned Deloitte & Touche to review the results reached by Towers Perrin. Deloitte & Touche agreed with Towers Perrin, *i.e.*, concluded that US Airways' administration of the Plan was consistent with the Plan language. *Id.* Appendix to this brief at 6a.[3]

4. ***The litigation*****:** After the outside actuarial firms had confirmed that US Airways had been administering the Plan in

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3. Deloitte & Touche did recommend, however, that the letter agreement being negotiated to memorialize Plan operations be more explicit in confirming that the calculation is to be made without assuming the reinvestment of dividends. *Id.*

a manner consistent with its terms, ALPA informed the complaining pilots that it would not pursue the matter on their behalf and urged them to obtain separate counsel. Pet. at 7; Appendix to this brief at 4a. Rather than filing a claim with the Retirement Board, petitioners sued US Airways, US Airways Group, Inc. (the holding company which owns US Airways), and the Plan under the Employee Retirement Income Security Act ("ERISA"). Counts I and III of the Complaint alleged that US Airways had misinterpreted and thus misapplied the negotiated benefit terms. Count II alleged that US Airways had inaccurately described the available benefits in the Plan's Summary Plan Description.

The district court concluded that the interpretation of the collectively bargained pension benefit is the function of the "mandatory, exclusive, and comprehensive [arbitration] system for resolving" contractual disputes established under the Railway Labor Act — in this instance, the Retirement Board. *See Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963). The court concluded (and petitioners did not disagree) that Counts I and III of the Complaint turned entirely on the interpretation of the contract. If petitioners are correct in their reading of the contract, the court held, the system board could award the requested relief; if they are incorrect, as a matter of law, Counts I and III of the Complaint state no viable ERISA claim. The court accordingly dismissed Counts I and III of the Complaint. The court concluded, however, that petitioners might have an independent ERISA claim under Count II — even if the Retirement Board rejected petitioners' construction of the contract — and so it stayed proceedings on that Count pending completion of the system board proceedings.

Petitioners sought reconsideration of the district court's ruling; the court denied the motion. Pet. App. 3a. Petitioners then filed their first appeal in this case, but the D.C. Circuit held that the Order was not an appealable final order, and

dismissed the appeal. *Everett v. US Airways Group, Inc.*, 132 F.3d 770 (D.C. Cir. 1998).

On remand, the district court certified its Order dismissing Counts I and III of the Complaint pursuant to Fed. R. Civ. P. 54(b). On this second appeal, the court of appeals affirmed the judgment of the district court substantially for the reasons stated in the district court's opinion. Pet. App. 2a. Petitioners now seek a writ of certiorari.

SUMMARY OF ARGUMENT

1. The only question answered by the court of appeals — and the only one posed by the petition — concerns the exclusive and mandatory jurisdiction of system boards of adjustment to determine the meaning of labor contracts in the airline industry. This Court has held repeatedly that, under the Railway Labor Act, *only* statutorily mandated arbitration boards have jurisdiction to interpret a collective bargaining agreement. This is true even when the contract provision at issue concerns an employee benefit otherwise regulated by the ERISA.

Petitioners insist that the Railway Labor Act and its compulsory dispute resolution processes apply only to current employees, not to former employees. This Court, however, has twice held expressly that the RLA's arbitration provisions apply equally to current *and* former employees so long as "the claim itself arises out of the employment relationship." *Pennsylvania R.R. v. Day*, 360 U.S. 548, 552 (1959) (emphasis added); *see also Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). Any other rule, this Court has held, would result in a gerrymandered dispute resolution process, with arbitrators construing the contract for active employees and juries construing the same provisions for retired employees. Such a schizophrenic system is bound to produce inconsistent results — with one set of rules applicable to active employees, and a different set of rules applicable to a second, otherwise identically

situated group of participants. That is precisely the evil Congress and this Court sought to avoid by requiring that *all* contract disputes be channeled into the system boards.

2. Petitioners also assert that pension benefit claims are not subject to arbitration because they do not involve "rates of pay, rules, or working conditions." This Court has held, however, that a dispute is subject to the RLA's exclusive arbitration system so long as "a [non-frivolous] claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989). Interpreting this standard, the courts of appeals uniformly have held that pension and other benefit disputes fall within the system board's exclusive jurisdiction.

3. Petitioners claim that the court below rejected the holding of the Sixth Circuit Court of Appeals in *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983), thereby creating a division of circuit authority on an important question. The court below, however, only "reject[ed] the applicability of [*Kaschak*] *to the facts here*. . . ." Pet. App. 2a (emphasis added). This hardly qualifies as a split of authority requiring this Court's intervention.

Moreover, the court below was correct in its treatment of *Kaschak*. In that case, the union had assertedly told one of its members that it would pursue a grievance on his behalf, lulling the individual into inaction until it was too late for him to pursue the grievance on his own. The Sixth Circuit held that the union's misconduct had effectively precluded individual action and therefore entitled the plaintiff to bypass the RLA's arbitration procedures. 707 F.2d at 908. Here, by contrast, ALPA explicitly told petitioners that it would *not* pursue the matter for them and urged them to secure independent counsel; petitioners failed to press their claims before the Retirement Board only because they thought they had a better chance on the merits in court.

4. In the absence of any real dispute about the legal standards applicable to contract disputes under the RLA, petitioners argue that the court of appeals misperceived the idiosyncratic facts in this case; those facts do not give rise to any issue worthy of this Court's review.

Petitioners rationalize their failure to pursue the RLA's adjustment board procedures by asserting that to have submitted to arbitration would have been "futile." They assert that US Airways and ALPA (whose members comprise the Retirement Board) are allied against them, and therefore complain that they were (and are) destined to lose in arbitration.

The court of appeals rejected this assertion based on the uncontested facts. It may well be difficult to conceive how petitioners could prevail on the merits of the claim, *either* before the Retirement Board or in the district court; US Airways and ALPA — the entities that negotiated the benefit — and two of the nation's most respected actuarial firms (Deloitte & Touche and Towers Perrin) agree that petitioners are simply wrong. The doctrine of futility, however, does not grant special rights to those with the most baseless claims, those cases in which an adverse result is most plainly fore-ordained. The rule urged by petitioners would permit those with the most frivolous claims to pick their forum, while those with worthy, or even colorable, claims would be routed to mandatory arbitration.

Petitioners also predict that an arbitration proceeding before the system board would deny them due process, and suggest that if an arbitration occurs, ALPA would likely violate the duty of fair representation it owes, at a minimum, to its current pilots. Petitioners have not been deprived of due process, however, and the Complaint alleged no breach of the duty of fair representation, indeed, alleged no wrongdoing at all by ALPA. Petitioners only make dire predictions about what likely would result were their claims submitted to the system board.

Even assuming that due process protections apply to arbitration proceedings under the RLA (and this Court has held otherwise), the inchoate nature of petitioners' fair representation and due process arguments makes them particularly ill-suited to review on *certiorari*. Petitioners seek to avoid the mandatory and exclusive dispute resolution mechanism designed by Congress simply because they find it inconvenient.

There simply is no need to except petitioners from the jurisdiction of the RLA's arbitration boards. Petitioners will suffer no prejudice if they are required to submit to the RLA's dispute resolution processes. If petitioners go to arbitration, and are dissatisfied with the results, the RLA explicitly permits them to return to court in an action to impeach the award, and they can assert the arguments they advance in the petition, but with the benefit of a full record.

The exception urged by petitioners would inject unnecessary confusion and uncertainty into a settled and predictable area of the law. Currently, both employees and employers know that all of their contract construction disputes will go to a system board, and will be considered promptly by individuals with intimate knowledge of the industry, the parties, and the history of collective bargaining between them. The rule urged by petitioners would result in parallel proceedings in arbitration and in federal court, with the accompanying potential for inconsistent results and labor unrest. The petition is premature and inconsistent with the RLA. It should be denied.

REASONS FOR DENYING THE WRIT

I.

UNDER THIS COURT'S PRECEDENTS, ONLY SYSTEM BOARDS OF ADJUSTMENT HAVE JURISDICTION TO CONSTRUE RLA COLLECTIVE BARGAINING AGREEMENTS.

The central question posed by the merits of petitioners' claims is the meaning of the phrase "unadjusted for dividends" — a question of contract interpretation. The courts below, however, properly recognized that under the Railway Labor Act, the business of contract interpretation is a monopoly owned by system boards of adjustment — here the Retirement Board, established pursuant to the RLA and implemented by the ALPA-US Airways collective bargaining agreement. The statutory arbitration procedure for resolving contract interpretation, or "minor," disputes is "a mandatory, exclusive, and comprehensive system." *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963). "[T]he compulsory character of [the system board procedures] stems not from any contractual undertaking between the parties but from the [RLA] itself." *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (citations omitted).

The court of appeals' jurisdictional determination is supported by an unbroken line of decisions from this Court and a uniform body of circuit law. Petitioners are left to nibble at the margins of forty years of established precedent. There is no issue worthy of *certiorari* present in this case.

A. This Court Has Held Explicitly That The System Board Process Is Mandatory For Retired Employees

Petitioners claim that the system board procedures do not apply to them because some of them are retired, and therefore, at least the retired petitioners are not "employees" under the purported "plain language" of the RLA. The claim is frivolous, foreclosed by the language of the statute, this Court's decision in *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), and every subsequent lower court decision to decide the point. Specifically, the Court in *Day* said that:

> The [RLA arbitration process] was established as a tribunal to settle *disputes arising out of the relationship between carrier and employee*. All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are *equally applicable when, as here, the employee has retired from service . . . . The same collective bargaining agreement must be construed with the same need for uniformity of interpretation and orderly adjustment of differences*. There is nothing in the [RLA] which requires that the employment relationship subsist throughout the entire process of administrative settlement. The purpose of the [RLA] is fulfilled if the *claim itself arises out of the employment relationship* which Congress regulated.

Id. at 551-52 (emphasis added).

Petitioners' contrary rule would turn retirees into a "class of preferred claimants":

> [Under a contrary rule,] [r]etired employees would be allowed to bypass the Board specially constituted for hearing . . . disputes whenever they deemed it

> advantageous to do so, whereas all other employees would be required to present their claims to the Board. . . . To allow [the retired respondent] now to try his claim in the District Court would only accentuate the danger of inequality of treatment and its consequent discontent which it was the aim of the [RLA] to eliminate. . . . *Since nothing is a greater spur to conflicts . . . than . . . unfair differentials, not to respect the centralized determination of these questions through the [RLA] Adjustment [procedure] would hamper if not defeat the central purpose of the [RLA].*

Day, 360 U.S. at 553 (emphasis added).

Day is no aberration; every court to consider the question has concluded that RLA adjustment procedures must be followed even by individuals who are no longer active employees, as long as the underlying claim arose out of the employment relationship.[4]

Petitioners seek precisely the result *Day* was intended to prevent. Well over one hundred of the petitioners still worked

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4. *See, e.g., Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 695 (9th Cir. 1993) (court lacked subject matter jurisdiction over former employee's ERISA claim); *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992) (same), *cert. denied*, 507 U.S. 992 (1993); *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir. 1989) (former employee who alleged that railroad lied to insurance company following his termination about his entitlement to post-termination benefits is obligated to follow RLA procedure); *Leu v. Norfolk & Western Ry.*, 820 F.2d 825, 832 n.10 (7th Cir. 1987) (former employee's claim that railroad improperly offset medical charges from settlement is subject to RLA procedures); *Air Line Pilots Ass'n Int'l v. Alaska Airlines, Inc.*, 735 F.2d 328, 329 (9th Cir. 1984) (retired employee's grievance regarding calculation of retirement benefits, filed several months after retirement, is subject to RLA adjustment procedures).

as pilots for US Airways when this lawsuit was filed. Even under petitioners' reading of *Day*, those petitioners still employed by US Airways would be obligated to use the RLA's contract dispute procedures, but the remaining petitioners would be free to pursue a federal court action.[5] Neither case law nor logic supports such a bizarre result.

Petitioners' "plain language" argument is also faulty as a matter of statutory construction. Petitioners say that as retired employees of US Airways, they are not "employees" under the RLA because they are no longer "in the service of [a] carrier." 45 U.S.C. § 151 Fifth. The statutory term "employee," however, "*includes* every person in the service of a carrier,"[6] but it does not *exclude*, either expressly or by implication, individuals who were, but no longer are, "in the service of a carrier."[7] *Id.* (emphasis added). Petitioners seek to read into the statute language of limitation that simply does not exist.

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5. At oral argument in the court of appeals, petitioners' counsel suggested that so long as *one* of the group of claimants had retired, they would *all* be excused from pursuing the RLA's dispute resolution process.

6. Petitioners excised the word "includes" from their excerpted definition of the term "employee." Pet. at 12.

7. For this reason, petitioners cannot rely on *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236-37 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), which held that *applicants* for employment are not yet RLA employees. Unlike former employees, the claims of applicants will not involve "either incidents that occurred or benefits that accrued while they had been employed and subject to the protections of the RLA." *Air Line Pilots Ass'n, Int'l v. United Air Lines*, 802 F.2d 886, 912 (7th Cir. 1986) (holding that pilots who never performed any work for United nor submitted to United's supervision of them in their work were not "employees" under the RLA; distinguishing pilots' status under the RLA from the status of former employees who are "employees" under the RLA, according to *Day*), *cert. denied*, 480 U.S. 946 (1987).

Petitioners' constricted reading of the term "employee" is patently inconsistent with this Court's decisions in both *Day* and *Andrews*. Both cases involved claims by individuals who formerly worked for the carrier (*i.e.*, those no longer "in the service of a carrier"), both raised disputes about the meaning of the collective agreement, and this Court determined that both claims were within the exclusive jurisdiction of the RLA's arbitration boards.

Indeed, if petitioners' reading of the statute were correct, system boards of adjustment would be powerless to hear wrongful discharge claims, since, by definition, the grievant in these cases will always be a *former* employee — no longer "in the service of [the] carrier" — by the time the matter was grieved. This unjustifiably narrow reading of the term would bleed the statute of its most important employee protections. *Accord Professional Cabin Crew Ass'n v. National Mediation Bd.*, 872 F.2d 456, 460 (D.C. Cir.) (rejecting union's "plain language" argument that former strikers are not "employees" under the RLA; the word "includes" in the RLA definition of "employee" is not intended to be a word of limitation; holding that the union's "extreme position has been rebuffed by the [National Mediation] Board and courts alike"), *cert. denied*, 493 U.S. 974 (1989); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-42 (1997) (term "employee" as used in Title VII includes former employees, *inter alia* because the term as used in the statute includes no "temporal qualifier"; "Congress . . . could have used the phrase 'current employees' ").

B. The System Board's Jurisdiction Is Not Optional

Petitioners make two further efforts to distinguish *Day*; neither is meaningful:

1. Petitioners argue that *Day* does not apply because the employee there filed a grievance under the RLA prior to quitting; petitioners note that they "did not commence the RLA process while they were employees."

Day, however, expressly rejected this proffered distinction. The determining factor is not the claimant's employment status at any particular point in the dispute resolution process; rather "[t]he purpose of the [RLA] is fulfilled [and its mandatory arbitration system applies] if the *claim itself arises out of the employment relationship* which Congress regulated." *Day*, 360 U.S. at 552 (emphasis added). Petitioners' entitlement to pension benefits arises, if at all, out of their employment relationships with US Airways.[8]

2. Similarly, petitioners contend that their pension benefit claim is not subject to arbitration because it is not a "minor" dispute — *i.e.*, it does not "grow[ ] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153(i). As this Court has held, a dispute is minor as long as "a [non-frivolous] claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989).

Petitioners' claim is wholly contingent on the meaning of the negotiated plan language. Thus, Petitioners' claim

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8. Petitioners also rely on *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) ("*PPG*"), for the proposition that because the term "employee" as used in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, does not include retirees, the same is true under the RLA. Petitioners' reading of *PPG* is selective at best (since the *PPG* opinion suggested that the remedy available to the retired employees was to arbitrate their claim to benefits, *id.* at 181 n.20), but more importantly, the case interprets the wrong statute — one where arbitration is an option rather than a statutory mandate — and answers an entirely different question about the scope of the bargaining duty. It did not overrule, limit, or even mention *Day*. It is irrelevant.

unarguably is a minor dispute — subject to the exclusive jurisdiction of the system board.[9]

C. The Jurisdiction Of The System Board Is Not Dependent On The Superiority Of Arbitral Competence In A Given Case

Petitioners also argue that the RLA's mandatory arbitration system does not apply whenever labor arbitrators generally lack specialized knowledge regarding the contractual issue presented.

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9. The courts of appeals have uniformly held that disputes over pensions and other post-retirement benefits are minor disputes, and that pension benefits are comprehended within the phrase "rates of pay, rules, or working conditions." *See Long*, *supra*, 994 F.2d at 695 ("In determining the extent of the pilots' benefits under the collectively bargained pension agreement, it was within the Retirement Board's jurisdiction to consider the weight that should be accorded to the summary plan description"); *Bowe*, *supra*, 974 F.2d at 103 (affirming dismissal for lack of subject matter jurisdiction because former employee's "claim for disability benefits requires the interpretation or application of the collective bargaining agreement"); *Beard*, *supra*, 893 F.2d at 123 (holding that Adjustment Board had exclusive jurisdiction over benefit claim, even though claim filed after plaintiff left railroad's employ); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines*, 627 F.2d 272, 275 (D.C. Cir. 1980) ("[A]ir carriers and their employees are obliged to bargain collectively over 'rates of pay, rules, or working conditions' terms which include employee pensions") (citation omitted); *De la Rosa Sanchez v. Eastern Airlines*, 574 F.2d 29, 32-33 (5th Cir. 1978) ("The determination of whether plaintiff was entitled to any pension payments from [the airlines] was exclusively for the Pilots System Board of Adjustment"); *Jackson v. Trans World Airlines*, 457 F.2d 202, 204 (2d Cir. 1972) ("Retirement and pension plans are recognized as mandatory subjects of the collective bargaining process") (citations omitted); *Elgin Joliet & E. Ry. v. Brotherhood of R.R. Trainmen*, 302 F.2d 540, 543-44 (7th Cir.) (holding that pension plans are encompassed by the phrase "rates of pay, rules, and working conditions," and therefore are a mandatory subject of collective bargaining), *cert. denied*, 371 U.S. 823 (1962); *McMullans v. Kansas, Oklahoma & Gulf Ry.*, 229 F.2d 50, 54-55 (10th Cir. 1956) (same), *cert. denied*, 351 U.S. 918 (1956).

Under petitioners' thesis, a district judge is entitled to conclude in any given case that he or she is more competent on the particular subject matter of the contract than are arbitrators as a class, and on that basis deny the system board's jurisdiction. But Congress and this Court have plainly drawn an unbreachable line marking out the boundaries of the system board's jurisdiction. If the dispute "relates . . . to the meaning or proper application of a particular provision" of a collective bargaining agreement, it must be handled by the RLA's arbitration boards and not the courts. *Consolidated Rail*, 491 U.S. at 303. There simply is no room for the case-by-case competence inquiry petitioners propose.

II.

PETITIONERS HAVE FAILED TO IDENTIFY ANY DIVISION OF AUTHORITY AMONG THE CIRCUIT COURTS RELEVANT TO THEIR FAILURE TO USE THE SYSTEM BOARD PROCESS.

There is no genuine inter-circuit conflict on any issue posed by the petition. Petitioners argue that the court below rejected the Sixth Circuit's holding in *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983). In fact, the D.C. Circuit acknowledged *Kaschak*, but correctly concluded that the *Kaschak* holding did not apply.

The plaintiff in *Kaschak* sued his employer, Conrail, for wrongful discharge. Conrail moved to dismiss the claim because Kaschak had failed to grieve his discharge through the system board process. The district court granted the motion, but the Sixth Circuit reversed, holding that the union, through no fault of Kaschak, had failed to initiate Kaschak's grievance in a timely manner. The court observed:

> While there is no doubt that *an employee may not opt to have his minor dispute resolved before a court rather than before the Board*, that is *not* the situation

> which Kaschak's claim presents to this Court. Kaschak contends that he never had the chance to choose between the Board and the district court. Rather, *he claims that he requested the Union to present his grievance to the Board and that the time for individual resort to the Board passed while he was relying on the Union to represent him.*

Id. at 908 (emphasis added in part; footnote omitted). In order for Kaschak to sue Conrail in federal court, the Sixth Circuit concluded, he would have to meet the "extreme" burden of establishing: (1) that his failure to request arbitration before the Board individually was caused by the Union's breach of the duty of fair representation (*i.e.*, its failure to process his grievance); and (2) that it was reasonable for him to rely on the union to process the grievance. *Id.* at 913.

As the court below concluded, *Kaschak* does not apply to this case. Petitioners failed to initiate a claim before the Retirement Board — *not* because ALPA falsely promised that it would pursue the grievance on their behalf — but because petitioners believed they could get a more sympathetic hearing in court. Indeed, ALPA explicitly told petitioners that the Union would *not* pursue their claim and urged them to get their own lawyer. Pet. at 7. Petitioners were not "lulled" into inaction by union misfeasance; they were tempted into federal court by the prospect of a decisionmaker less familiar with the contract, its history, and the parties' negotiating relationship.

That is why the D.C. Circuit explicitly held: "We reject the applicability of [*Kaschak*] *to the facts here*. . . ." Pet. App. at 2a (emphasis added).[10] This hardly qualifies as a split of circuit authority requiring this Court's intervention.

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10. Curiously, Petitioners also cite the Third Circuit's decision in *Miklavic v. USAIR, Inc.*, 21 F.3d 551 (3d Cir. 1994), to excuse their failure to initiate arbitration. In that case, however, the Third Circuit held that the rule announced in *Kaschak* did *not* excuse the plaintiffs' (Cont'd)

III.

RESORT TO THE SYSTEM BOARD PROCESS WOULD NOT HAVE BEEN "FUTILE," AND PETITIONERS HAVE NOT SUFFERED ANY BREACH OF THE DUTY OF FAIR REPRESENTATION OR DEPRIVATION OF DUE PROCESS.

Petitioners assert that resort to the Retirement Board would be "futile" — that they would be the victim of a breach of the duty of fair representation by ALPA — because US Airways and ALPA purportedly "are openly and unequivocally adverse to [their] position." Pet. at 21. Petitioners predict that if they actually pursued their claim before the system board, they would lose. This argument suffers from several flaws; each is independently fatal to the petition:

1. The doctrine of futility does not grant special rights to those with the most baseless claims, *i.e.*, those cases in which an adverse result is most plainly fore-ordained. Such a regime would be patently inconsistent with the RLA. *See Andrews*, *supra*, 406 U.S. at 322 ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law"). As the Third Circuit has explained, "[a]n employee whose substantive claims are clearly foreclosed by the language of the collective bargaining agreement might argue that submission of his claim to the Adjustment Board would be futile; yet clearly, this is not the sort of futility that would, in itself, warrant access to a judicial forum." *Capraro v. United Parcel*

(Cont'd)

failure to initiate arbitration, because this failure was "simply no fault of the union." *Id.* at 558. The petitioners remained "free to file a timely grievance, even without the [union]." *Id.* Accordingly, their complaint, which asserted only a minor dispute, was dismissed for lack of subject matter jurisdiction. *Id.*

Serv. Co., 993 F.2d 328, 335 n.11 (3d Cir. 1993); *see also Kaschak*, *supra*, 707 F.2d at 908 ("[T]here is no doubt that an employee may not opt to have his minor dispute resolved before a court rather than before the Board"). The rule urged by petitioners would give those with the most frivolous claims a choice of fora, while those with worthy, or even colorable, claims would be routed to mandatory arbitration.

2. Petitioners claim that they are bound to lose in arbitration, not because of the merits of their claim, but because ALPA has a hidden, self-interested agenda in rejecting petitioners' construction of the contract. They predict that this self-interest would manifest itself during the hearing when ALPA would join US Airways in rejecting petitioners' claims on the merits.

Petitioners, however, cannot bypass the "mandatory, exclusive, and comprehensive system"[11] for resolving contractual disputes simply because they suspect that the union might act out of self-interest. As this Court explained in *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) (emphasis added; citation omitted), "it is settled that the employee must at least *attempt* to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." More specifically, "a potential conflict between ALPA and [petitioners] does not alone render the proceedings before the Adjustment Board futile." *Calvert v. Trans World Airlines*, 959 F.2d 698, 701 (8th Cir. 1992) (rejecting argument that "any attempt to seek relief before the Adjustment Board would be futile" because of alleged hostility of the union); *Morales v. Southern Pac. Transp. Co.*, 894 F.2d 743, 745 (5th Cir. 1990) (claim that union officials were hostile towards employees was insufficient to show futility).

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11. *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

The Railway Labor Act provides petitioners an orderly process to test their theories of hostility: *if* petitioners had litigated their claim before the system board, and had lost, and *if* ALPA's conduct had suggested fraud or corruption, the resulting award would have been subject to impeachment in federal court under 45 U.S.C. § 153 First (q). In this scenario, petitioners could have asserted the arguments they advance in the petition, but with the benefit of a full record.

But petitioners argue that Congress' design is just a waste of their time. Their petition poses what amounts to a claim of "anticipatory corruption," but no facts support it and no law — from this Court or any other court — would authorize the procedural bypass they seek.

For all of the foregoing reasons, petitioners' claims of futility are *predictions*, not facts, and the arguments advanced in the petition are premature. To be sure, petitioners' claim is an unlikely one at best in *any* forum. But petitioners cannot know what position ALPA might take in arbitration or whether ALPA will vote to appoint a Referee. The RLA provides an orderly process for adjusting contract interpretation disputes; petitioners cannot shed themselves of this statutory mandate simply because they find it inconvenient.

Similarly, petitioners' due process claim is premature. They have not suffered any depravation of due process[12]; they merely suggest that they would likely have suffered some deprivation

12. The due process clause does not even apply to system board proceedings under the Railway Labor Act (although the Court need not reach this question given the inchoate nature of petitioners' claim). In *Sheehan*, the plaintiff argued that he had been denied a "fair hearing" on the merits of his claim, but this Court emphasized that "[j]udicial review of Adjustment Board orders is limited to [the] three specific grounds [set forth in the statute itself]. [Arbitration orders under the RLA] may be set aside only for the three reasons specified therein. *We have time and again emphasized that this language means just what it says.*" *Id.* 439 U.S. 89, 93 (emphasis added).

had they actually proceeded to arbitration.[13] Significantly, all but one of the RLA decisions cited by petitioners in support of their due process claim, Pet. Br. at 23-27, involved *post-hearing* challenges made on a full record.[14] The other decision — *Haney v. Chesapeake & Ohio R.R.*, 498 F.2d 987 (D.C. Cir. 1994) — explicitly *rejected* the type of pre-hearing challenge petitioners are attempting here, instructing the plaintiff to proceed to

13. *Cf. Hodel v. Indiana*, 452 U.S. 314, 335-36 (1981) (holding that due process challenge to statute's civil penalty procedures was "premature" because plaintiffs did not show they were ever assessed civil penalties, much less that they were injured); *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 284 (1969) (holding that a decision on petitioner's due process claims regarding hearing procedures would be "premature," because intervening events, such as an administrative finding for the petitioner, may obviate the need for a challenge to the procedures); *Thomas v. City of New York*, 143 F.3d 31, 34-35 (2d Cir. 1998) (holding that due process challenge to license issuance process was "premature" before a hearing or the issuance of written findings); *Frey v. Commodity Exchange Auth.*, 547 F.2d 46, 49 (7th Cir. 1976) (dismissing pre-hearing due process challenge because it was uncertain how the administrative law judge would rule).

14. *See Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 89-90 (1978) (Board decision rendered after hearing); *Union Pac. R.R. v. Price*, 360 U.S. 601, 602 (1959) (same); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 482-83 (1957) (same); *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994) (same); *Edelman v. Western Airlines*, 892 F.2d 839, 841 (9th Cir. 1989) (same); *Hayes v. Western Weighing and Inspection Bureau*, 838 F.2d 1434, 1436 (5th Cir. 1988); *Steffans v. Brotherhood of Ry. Airline and Steamship Clerks*, 797 F.2d 442, 443-44 (7th Cir. 1986) (same), *amended*, 123 L.R.R.M. 2835 (7th Cir. 1986); *Elmore v. Chicago & Illinois Midland Ry.*, 782 F.2d 94, 94-95 (7th Cir. 1986) (same); *Henry v. Delta Airlines*, 759 F.2d 870, 871 (11th Cir. 1985) (same); *Hall v. Eastern Airlines*, 511 F.2d 663, 663 (5th Cir. 1963) (same); *Hornsby v. Dobard*, 291 F.2d 483, 484 (5th Cir. 1961) (same); *Edwards v. Capital Airlines*, 176 F.2d 755, 756 (D.C. Cir. 1949) (same), *cert. denied*, 338 U.S. 885 (1949); *D'Elia v. New York, New Haven & Hartford R.R.*, 230 F. Supp. 912, 913 (D. Conn.) (same), *aff'd*, 338 F.2d 701 (2d Cir. 1964); *Farris v. Alaska Airlines*, 113 F. Supp. 907, 908 (W.D. Wash. 1953) (same).

arbitration and use the Act's processes to challenge any subsequent union malfeasance.

The orderly processes of the Railway Labor Act serve important goals; the court of appeals correctly concluded that petitioners were obligated to process their claims through the Act's procedures. No decision of this court or any court of appeals would suggest a different result.

CONCLUSION

For the foregoing reasons, the Court petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — LETTER RE DATA ON INVESTMENT PERFORMANCE FOR 1973 TO ALPA DATED FEBRUARY 12, 1974

Mr. G. F. Garth February 12, 1974

H. L. Dyer

Data on Investment Performance for 1973 to ALPA

For the past several years Paine, Webber, Jackson & Curtis has been employed by ALPA to perform a performance review of the managers of the retirement assets of most major airline pilot variable benefit funds. To date the only Allegheny account which has been included in this survey was the Allegheny Variable Benefit Trust Fund at Chase Manhattan Bank. The Mohawk Variable Benefit at Chase Manhattan was identified separately.

Effective December 1, 1972, the pilots' plan no longer involves a real variable. There continues to be a phantom "A" and "B" benefit. The investment yield on the "B" account, though, is the fictitious average that would have been earned had the assets been invested in the S & P 500 stocks (without reinvestment of dividends).

The 1972 performance through December 31, 1972 was reviewed by Paine, Webber last year. Unless someone here does something differently this year, the Chase Manhattan results would probably be reported as a routine item of information so that a similar review could be done of the 1973 results. By this memorandum I wish to raise the question of whether or not the recent results of any portion of the pilots' retirement fund should be reported to ALPA.

Appendix A

The new pilots' retirement plan provides for a basic final pay benefit offset by a portion of the Family Social Security benefit. The phantom "B" plan can be calculated irrespective of the performance results of any of the funds now under management. It would, in fact, be an error to imply that the Chase accounts still labeled "Allegheny Variable" or "Mohawk Variable" were the earnings rates that applied to the phantom "B" fund in 1973.

Unless a decision in this matter has already been made, I would ask that no information on 1973 investment performance results on any of the accounts at either Connecticut General or Chase Manhattan Bank be released to any person except to representatives of A. G. Becker & Co. for the performance analysis already contracted for. I believe a decision to give ALPA performance results for 1973 should be deliberately made this year and the consequences examined prior to the release of any information.

s/ H.L. Dyer
H. L. Dyer

HLD/pg

cc: Mr. W. J. Short
Mr. W. L. Wickham

APPENDIX B — DECLARATION OF MARVIN A. EVERETT DATED MARCH 18, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

Case No. 95-990 (PLF)

M.A. EVERETT, et al.

Plaintiff,

v.

USAIR GROUP, INC., et al.

Defendants.

DECLARATION OF MARVIN A. EVERETT

I, Marvin A. Everett, am one of the plaintiffs in the above-captioned action. The following declaration is based upon my personal knowledge and is given under penalty of perjury:

1. On or about February 2, 1994, I was present at a meeting with Captains Thomas Howell, Donald Reubert, Terry Dickinson. Also present from ALPA were MEC Chairman Peter Gauthier, Eric Litt, Owen Brown (R & I Chairman and Retirement Board member), and ALPA attorney Jeff Small. Captain Allman, MEC Grievance Chairman was also present, as was attorney Douglas Sorensen.

Appendix B

2. At the meeting, which was held to discuss our request for action by ALPA and the MEC relating to the Prior Plan benefit calculations for retired pilots as well as current active pilots who are affected by the Prior Plan, Owen Brown stated that ALPA did not represent retired pilots. Peter Gauthier stated that ALPA could not help and that the pilots, if they wanted to pursue the matter independently, would have to bring a lawsuit in court.

3. As a retired pilot I am no longer eligible to be a member of ALPA and am no longer represented by them, just as all other retired pilots of USAir are no longer represented by ALPA. At the time of the meeting, I was an active pilot, but Captains Dickinson and Reubert were retired and Captain Howell was in the process of retiring.

Executed 18 March 1996, Collier County, Florida:

Marvin A. Everett

APPENDIX C — RETIREMENT INCOME STUDY FOR PILOTS OF USAIR, INC. DATED JUNE, 1993

**Deloitte &
Touche**

RETIREMENT INCOME STUDY
For
PILOTS OF USAIR, INC.

June 1993

Actuarial, Benefits
and Compensation
Consulting

Member of
HUMAN
RESOURCES
CONSULTING
GROUP

Appendix C

**Deloitte &
Touche**

**Deloitte Touche
Tohmatsu
International**

**Actuarial, Benefits and
Compensation
Consulting**

400 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota
55402-1844
Telephone: 612 397-4000
Facsimile: 612 397-4550

June 1, 1993

Mr. Steve Hodgson
Field Representative
Air Line Pilots Association
535 Herndon Parkway
P.O. Box 1169
Herndon, VI 22070

Dear Mr. Hodgson:

We have completed our study of the retirement income plan for the pilots of USAir, Inc.

In general, USAir's current procedures used to calculate minimum benefits for pilots formerly covered under the provisions of the Retirement Income Plan for Pilots of Allegheny Airlines appear consistent with the plan, the letter of agreement, and documents available to us.

Appendix C

The only area of concern which may deserve some attention is the lack of definition in the 1992 proposed working agreement as to whether or not the Standard & Poor's index is to include dividends.

Sincerely,

s/ F. Jay Lingo
F. Jay Lingo, FSA, MAAA, EA
Principal

D3821
FJL/dku

Appendix C

I. OVERVIEW

A. Under the Retirement Income Plan for Pilots of Allegheny Airlines, Inc. (Prior Plan), the benefit consisted of a fixed income plan and a variable retirement income plan. The fixed income (defined benefit) benefit was split between a past service retirement income (generally 3/4 of 1% of compensation) and a future service retirement income (with accrual rates ranging up to 1-3/4% of compensation).

The variable retirement income plan was based on the purchase of retirement income units and the annual evaluation of those units. The retirement income units were purchased based on an assumed 3% yield rate. The value of retirement income units changed as actual investment returns varied from 3%.

B. The Retirement Income Plan for Pilots of USAir, Inc. (as amended and restated effective January 1, 1985) (Current Plan), provides a retirement benefit that is based on final average earnings and the Target Benefit Plan.

There is a special minimum benefit for participants who were in the Allegheny Airline's' system seniority list as of December 1, 1972. The variable retirement income portion of this benefit is accumulated based on the Standard & Poor's 500 stock index (unadjusted for dividends).

Appendix C

C. The methodology that USAir currently uses for calculations under (B) above is described in a March 15, 1990, letter from Robert Haver of TPF&C to Michelle Bryan at USAir and set forth in a proposed Letter of Agreement dated March 2, 1992. The variable retirement income portion of this benefit is accumulated based on the Standard & Poor's 500 stock index (no reference is made as to whether the index if unadjusted or adjusted for dividends). The methodology used by USAir uses the Standard & Poor's 500 index unadjusted for dividends.

D. The primary issue which requires clarification is whether the proposed Letter of Agreement dated March 2, 1992 intends that the Standard & Poor's 500 index be unadjusted or adjusted for dividends.

II. ISSUES

Current USAir calculations accumulate the variable income benefit at the Standard & Poor's 500 index without reinvesting dividends.

The Prior Plan used actual trust earnings after expenses to accumulate funds. According to Steve Hodgson's November 18, 1992 letter, the pilot working agreement refers to the variable account accumulating at the "Standard & Poor's 500 index" (with no reference as to whether the index is unadjusted or adjusted for dividends).

When using the Standard & Poor's 500 index unadjusted for dividends, retirement income

unit values are generated that gradually become substantially lower than they would have been under Standard & Poor's 500 index adjusted for dividends. However, the resulting purchase of extra units is more than offset by the lower unit values. The attached Exhibit I shows this sample calculation for John Benn. The Exhibit shows that even though he would accumulate approximately 600 more units under the unadjusted approach, these units would generate an annual retirement income that was $27,000 less ($74,536 versus $47,693).

Rates for adjusting the value of retirement income units

Under the Prior Plan, the number of retirement income units allocated to individual pilots was determined by the following formula:

$$\frac{\text{Total Pilot Contribution}}{\text{Retirement Income Unit Value times Actuarial Annuity Value}}$$

The division by the Actuarial Annuity Value determined a deferred annual annuity amount payable at age 60. The division by the Retirement Income Unit Value converted this annual benefit amount into units.

The Retirement Income Unit Value in subsequent years varied by investment and demographic experience.

Appendix C

At any valuation date, all realized and unrealized gains and losses, as well as all dividends paid and declared but unpaid, were included in the Retirement Income Unit Value calculation.

Current calculations determine variable plan units based on the participant's actual earnings, assuming that the variable retirement income provisions under the Prior Plan remained in effect and that the investment performance thereunder would be equal to the investment performance of the Standard & Poor's 500 stock index (unadjusted for dividends).

Under the Prior Plan, actual trust earnings would have included dividends but also would have had expense charges. It would be reasonable to expect dividends to be in the 3% to 5% range and trust expenses to be in the ½% to 1% range.

A rate of return comparison using the Standard & Poor's 500 index unadjusted for dividends with the Standard & Poor's 500 with dividends since 1972 is as follows:

	With Dividend	**Unadjusted**
1972	18.90	15.63
1973	-14.77	-17.37
1974	-26.39	-29.72
1975	37.16	31.55
1976	23.57	19.15
1977	-7.41	-11.50
1978	6.39	1.06

Appendix C

1979	18.20	12.31
1980	32.27	25.77
1981	-5.01	-9.73
1982	21.44	14.76
1983	22.39	17.27
1984	6.20	1.40
1985	31.57	26.33
1986	18.57	14.62
1987	5.25	2.03
1988	16.33	12.40
1989	31.37	27.25
1990	-3.17	-6.56
1991	30.41	26.31
1992	7.61	4.46
Average	12.90	8.45

Examples

The first example in the letter from TPF&C is a calculation for John Benn. A second calculation was shown for Charles Haughey.

The attached exhibits show calculations done two ways:

(1) As currently being done by USAir.

(2) Adjusting unit values by the Standard & Poor's 500 index with dividends.

Appendix C

The summary of those exhibits is as follows:

Exhibit I (John Benn – Age 60 Retirement)

	(1)	(2)
Fixed Income	$39,526	$ 39,526
Variable Benefits	47,693	74,536
Minimum Benefit	87,219	114,062
"65%" Benefit	$102,946	$102,846
Final Benefit	$102,846	$114,062

Exhibit II (Charles Haughey – Age 53 Retirement)

	(1)	(2)
Fixed Income	$23,347	$23,347
Variable Benefits	22,940	31,457
Minimum Benefit	46,287	54,804
"65%" Benefit	$ 75,871	$ 75,871
Final Benefit	$ 75,871	$ 75,871

Mr. Haughey's benefits are not impacted by the minimum benefit because the calculation stops at 1987 and therefore fails to recognize the significant investment returns of 1988 and 1989.

Appendix C

EXHIBIT I

SAMPLE CASE -- JOHN BENN

	EOY AGE	UNIT VALUE 3% INTEREST S & P 500 W/O DIV	UNIT VALUE 3% INTEREST S & P 500 W/ DIV	DEFERRED ANNUITY FACTOR 3% INT	CALCULATED CONTRIB	USAIR METHOD S & P 500 W/O DIVIDENDS NEW UNITS	USAIR METHOD S & P 500 W/O DIVIDENDS TOTAL UNITS	USAIR METHOD S & P 500 W/O DIVIDENDS ANNUAL BENEFIT	S & P 500 WITH DIVIDENDS NEW UNITS	S & P 500 WITH DIVIDENDS TOTAL UNITS	S & P 500 WITH DIVIDENDS ANNUAL BENEFIT
1972	42	10.0000	10.0000	8.0585	0	601.60	601.60	6,016	601.60	601.60	6,016
1973	43	8.0223	8.2748	8.3002	5136	77.13	678.73	5,445	74.78	676.38	5,597
1974	44	5.4754	5.9136	8.5492	5432	116.04	794.77	4,352	107.44	783.82	4,635
1975	45	6.9910	7.8749	8.8057	6380	103.64	898.41	6,281	92.01	875.83	6,897
1976	46	8.0872	9.4476	9.0699	6566	89.52	987.93	7,990	76.63	952.46	8,998
1977	47	6.9487	8.4927	9.3420	7437	114.57	1102.50	7,661	93.74	1046.20	8,885
1978	48	6.8178	8.7723	9.6222	8153	124.28	1226.78	8,364	96.59	1142.79	10,025
1979	49	7.4340	10.0668	9.9109	8739	118.61	1345.39	10,002	87.59	1230.38	12,386
1980	50	9.0774	12.9275	10.2082	9795	105.70	1451.09	13,172	74.22	1304.60	16,865
1981	51	7.9520	11.9222	10.5145	11619	138.96	1590.05	12,644	92.69	1397.29	16,659
1982	52	8.8615	14.0566	10.8299	12794	133.31	1723.36	15,272	84.04	1481.33	20,822
1983	53	10.0901	16.7028	11.1548	13726	121.95	1845.31	18,619	73.67	1555.00	25,973
1984	54	9.9353	17.2217	11.4894	14890	130.44	1975.75	19,630	75.25	1630.25	28,076
1985	55	12.1857	21.9987	11.8341	15896	110.23	2085.98	25,419	61.06	1691.31	37,207
1986	56	13.5604	25.3220	12.1892	15923	96.33	2182.31	29,593	51.59	1742.90	44,134
1987	57	13.4327	25.8751	12.5548	16401	97.25	2279.56	30,621	50.49	1793.39	46,404
1988	58	14.6586	29.2238	12.9315	16893	89.12	2368.68	34,722	44.70	1838.09	53,716
1989	59	18.1098	37.2531	13.3194	17400	72.14	2440.82	44,203	35.07	1873.16	69,781
1990	60	19.0047	39.0940	13.7190	17922	68.74	2509.56	47,693	33.42	1906.58	74,536

VARIABLE BENEFIT	$47,693	$74,536
FIXED BENEFIT	$39,526	$39,526
MINIMUM BENEFIT	$87,219	$114,062
"65%" BENEFIT	$102,846	$102,846
FINAL BENEFIT	$102,846	$114,062

Appendix C

EXHIBIT II

SAMPLE CASE--CHARLES HAUGHEY							USAIR METHOD S & P 500 W/O DIVIDENDS				S & P 500 WITH DIVIDENDS		
	EOY AGE	UNIT VALUE 3% INTEREST S & P 500 W/O DIV	UNIT VALUE 3% INTEREST S & P 500 W/ DIV	DEFERRED ANNUITY FACTOR 3% INT	CALCULATED CONTRIB		NEW UNITS	TOTAL UNITS	ANNUAL BENEFIT		NEW UNITS	TOTAL UNITS	ANNUAL BENEFIT
1972	38	10.0000	10.0000	7.1598	0		131.00	131.00	1,310		131.00	131.00	1,310
1973	39	8.0223	8.2748	7.3746	3230		54.60	185.60	1,489		52.93	183.93	1,522
1974	40	5.4754	5.9136	7.5959	3292		79.15	264.75	1,450		73.29	257.22	1,521
1975	41	6.9910	7.8749	7.8238	3743		68.43	333.18	2,329		60.75	317.97	2,504
1976	42	8.0872	9.4476	8.0585	4354		66.81	399.99	3,235		57.19	375.16	3,544
1977	43	6.9487	8.4927	8.3002	4645		80.54	480.53	3,339		65.89	441.05	3,746
1978	44	6.8178	8.7723	8.5492	6047		103.75	584.28	3,984		80.63	521.68	4,576
1979	45	7.4340	10.0668	8.8057	8060		123.13	707.41	5,259		90.92	612.60	6,167
1980	46	9.0774	12.9275	9.0699	9434		114.59	822.00	7,462		80.46	693.06	8,960
1981	47	7.9520	11.9222	9.3420	10803		145.42	967.42	7,693		97.00	790.06	9,419
1982	48	8.8615	14.0566	9.6222	12583		147.57	1114.99	9,880		93.03	883.09	12,413
1983	49	10.0901	16.7028	9.9109	12922		129.22	1244.21	12,554		78.06	961.15	16,054
1984	50	9.9353	17.2217	10.2082	14372		141.71	1385.92	13,770		81.75	1042.90	17,961
1985	51	12.1857	21.9987	10.5145	15088		117.76	1503.68	18,323		65.23	1108.13	24,377
1986	52	13.5604	25.3220	10.8299	15064		102.58	1606.26	21,782		54.93	1163.06	29,451
1987	53	13.4327	25.8751	11.1548	15206		101.48	1707.74	22,940		52.68	1215.74	31,457

VARIABLE BENEFIT	$22,940	$31,457
FIXED BENEFIT	$23,347	$23,347
MINIMUM BENEFIT	$46,287	$54,804
"65%" BENEFIT	$75,871	$75,871
FINAL BENEFIT	$75,871	$75,871